TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. 1903.

No 154. 188.

EDWIN F. BROWN, AS RECEIVER OF THE PEOPLE'S NATIONAL BANK OF DENVER, COLORADO, APPELLANT,

vs.

GEORGE C. SCHLEIER AND THE PEOPLE'S NATIONAL BANK OF DENVER, COLORADO.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JANUARY 13, 1903.

(13,782.)

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(18,782.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 554.

EDWIN F. BROWN, AS RECEIVER OF THE PEOPLE'S NATIONAL BANK OF DENVER, COLORADO, APPELLANT,

vs.

GEORGE C. SCHLEIER AND THE PEOPLE'S NATIONAL BANK OF DENVER, COLORADO.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the September term, 1902, of said court, begun and held at the United States court-house in the city of Denver, Colorado, on the first Monday in September, to wit: the first day of September, A. D. 1902, and which said September term, 1902, was adjourned from the city of Denver, Colorado, to the city of St. Louis, Missouri, as provided by law, before the Honorable Walter H. Sanborn and the Honorable Amos M. Thayer, circuit judges, and the Honorable William Lochren, district judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the first day of March, A. D. 1902, a transcript of record, pursuant to an appeal allowed by the circuit court of the United States for the district of Colorado, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein Edwin F. Brown, as receiver of the People's National Bank of Denver, Colorado, was appellant, and George C. Schleier and The People's National Bank of Denver, Colorado, were appellees, which said transcript of record is in the words and figures following, to wit:

1 Pleas in the Circuit Court of the United States, for the District of Colorado, Sitting at Denver.

Be it Remembered, that heretofore, and on, to wit, the 22nd day of December, A. D. 1900, came Earl M. Cranston, as Receiver of The Peoples National Bank of Denver, Colorado, by Messrs. Cranston, Pitkin, and Moore, H. M. Orahood, J. H. Brown, and Watters & Kendall, his solicitors, and filed in said court his bill of complaint; and sued out of and under the seal of said court a subpoena in chancery against George C. Schleier and The Peoples National Bank of Denver, Colorado.

And the said bill of complaint is in words and figures as follows, to wit:

United States of America,
District of Colorado—ss.

In the Circuit Court of the United States for the Eighth Judicial Circuit in and for the District of Colorado Aforesaid.

Earl M. Cranston, as Receiver of the Peoples National Bank of Denver, Colorado, a National Banking Association, Plaintiff,

vs.

2 George C. Schleier and The Peoples National Bank of Denver, Colorado, a National Banking Association, Defendants.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of Colorado:

Earl M. Cranston, as the Receiver of The People's National Bank of Denver, Colorado, a national banking association as hereinafter alleged, and a citizen of the State of Colorado, brings this his bill against said The People's National Bank of Denver, Colorado, a national banking association of the city of Denver, Colorado, a citizen of the State of Colorado, and against George C. Schleier of the city of Denver, Colorado, a citizen of the State of Colorado.

And thereupon your orator complains and says:

1. That the matter and amount involved in this suit exceeds exclusive of costs, the sum or value of two thousand dollars ($2,000) and arises under the laws of the United States, and that this suit is instituted by direction of an officer of the United States, viz: The Honorable Comptroller of the Currency of the

Treasury of the United States, and is also for the purpose of winding up the business and affairs of said The People's National Bank of Denver, a national banking association established under the laws of and the National Bank Act of the United States.

2. That on or about the 30th day of July, A. D. 1889, the Honorable Comptroller of the Currency of the Treasury of the United States, under and in pursuance of the statutes
3 of the United States and an application made to him thereunder, by an organization certificate bearing date July 1st, A. D. 1889, issued his certificate bearing date the 30th day of July, A. D. 1889, authorizing the existence and the commencement of the transaction of business by said defendant, The People's National Bank of Denver, Colorado; and on and after the said date, as hereinafter alleged, there was, and still is, existing the said defendant The People's National Bank of Denver, Colorado, created, organized and existing under and in pursuance of the said Statutes of the United States, providing for the creation of and governing banks, known as and called "The National Bank Act," in pursuance of said Articles of Association executed under section 5154 of the Revised Statutes of the United States, approved June 22, A. D. 1874, and the subsequent acts of the Congress of the United States in addition to and amendatory thereof (all of which said acts will for convenience and brevity be hereinafter referred to as "The National Bank Act").

3. That in and by its said Articles of Association and the authority of the provisions of said National Bank Act, said defendant, The People's National Bank of Denver, Colorado, was authorized and empowered, and the same did provide:

(a) That the corporate name and title of the said association should be "The People's National Bank of Denver."

(b) That the place where the banking house or office should be located, and its operations of discount and deposit
4 carried on, and its general business conducted, should be in the city of Denver, in the county of Arapahoe aforesaid.

(c) That the capital stock of said association should be three hundred thousand dollars ($300,000) to be divided into shares of one hundred dollars ($100) each.

(d) That said association should continue for a period of twenty (20) years from the said date of the execution of its said organization certificate, viz: From July 1st, A. D. 1889, unless sooner dissolved.

4. That at all the times hereinafter mentioned, on and after the said first day of July, A. D. 1889, said People's National Bank of Denver, of the city of Denver in the county of Arapahoe, aforesaid, became and was a national banking association, and as such was authorized and empowered and possessed, under and in pursuance of said National Bank Act, of the following powers and rights:

(a) To have succession for the period of twenty (20) years from said first day of July, A. D. 1889, unless sooner dissolved.

(b) To have, and did have, a fully paid up capital stock to the amount of three hundred thousand dollars ($300,000) of the par value of one hundred dollars ($100) per share; and

(c) To transact its usual business as such national banking association at an office or banking house located in the city of Denver, in the County of Arapahoe aforesaid; (sec. 5190).

5 5. That for the purpose of its said business as such national banking association, said defendant bank was also empowered to make contracts, to purchase, hold, and convey real estate for the following purposes and for no others.

(1st) Such as should be necessary for its, said association's immediate accommodation in the transaction of its business.

(2d) Such as should be mortgaged to it in good faith for debts previously contracted.

(3d) Such as should be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

(4th) Such as it should purchase at sales under judgments, decrees or mortgages, to be held by such association, or should purchase to secure debts due to it; but should not hold possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years (5137).

6. But it was, at all the times herein mentioned, provided by said The National Bank Act, that said defendant association should not at any time be indebted or in any way liable to an amount exceeding the amount of its said capital stock, viz: Said three hundred thousand ($300,000) at such time actually paid in and remaining undiminished by losses or otherwise, except on account of discounts of the nature following:

(1st) Notes of circulation.

6 (2nd) Moneys deposited with or collected by said association;

(3d) Bills of exchange or drafts drawn against money actually on deposit to the credit of said association, or due thereto;

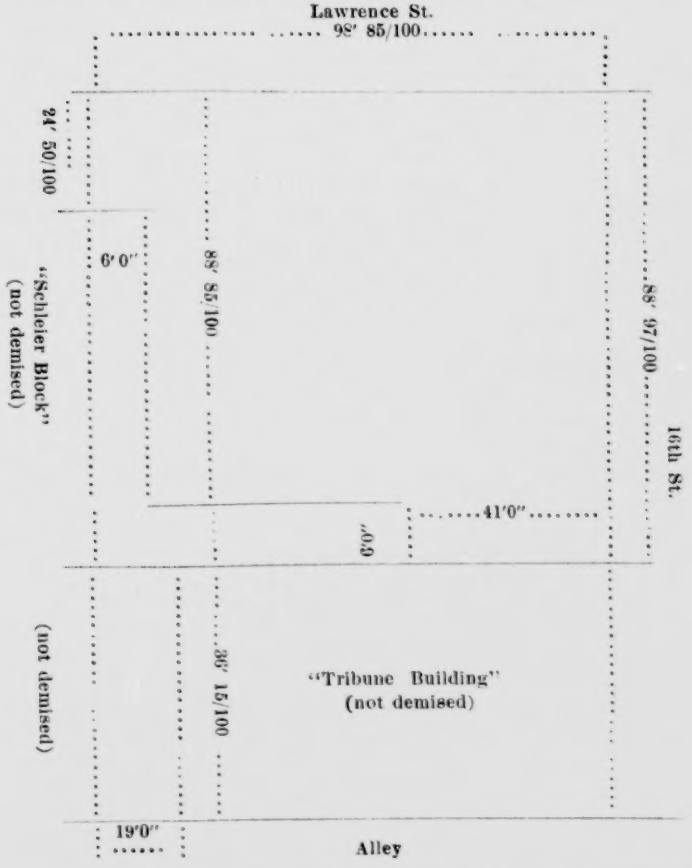
(4th) Liabilities to the stockholders of said association for dividends and reserve profits (5202).

7. That at the time of the creation and organization of said national banking association, its banking house and office was located in a store room in a building situated on Arapahoe Street between Sixteenth and Seventeenth Streets in said city of Denver, for which it paid rent, and then and there, and at all times thereafter, except as hereinafter alleged, continued to carry on and conduct its said national banking business.

8. That thereafter and during the month of September, A. D. 1889, the said defendant, George C. Schleier, was the owner in free simple and in possession of, lots numbered one (1), two (2), three (3), and four (4) all in block numbered seventy-five (75) in the East Division of the city of Denver, in the County of Arapahoe aforesaid, which said property is located at the corner of Lawrence and Sixteenth Streets, in said city of Denver, at a distance of about a block and a half from the said place of business of the said national banking association, situated on Arapahoe Street as aforesaid.

9. That during said month of September, 1889, and by an instrument in writing bearing date the 12th day of September, A. D. 1889, said national banking association, in violation of, in excess of, and in contravention of the provisions and prohibitions of said statutes of the United States comprising said National Bank Act and its said corporate powers, assumed to make and execute with the said defendant Schleier, an alleged pretended lease of the said real estate in said Block numbered seventy-five (75) which said pretended lease was recorded on September 21st, 1889, in book 547, at page 1 and the following pages of the records in the

office of the Clerk and Recorder of said Arapahoe County, and was and is in words and figures as follows, to wit:



8 This Indenture, made this twelfth day of September, A. D. 1889, between George C. Schleier, of the County of Arapahoe and State of Colorado, as party of the first part, and "The Peoples National Bank of Denver," a banking corporation existing under and by virtue of the Acts of the Congress of the United States as party of the second part,

Witnesseth that the said party of the first part, for and in consideration of the rents, covenants, and agreements hereinafter reserved and contained, to be paid, kept and performd by th said party of the second part, its successors and assigns, has demised and leased to the said party of the second part, all those premises situate, lying, and being in the City of Denver in

the County of Arapahoe and State of Colorado, known and described as follows, to wit: Commencing at the most northerly corner of lot one (1) in block seventy-five (75) in the East Division of the city of Denver; thence southwesterly along Lawrence Street ninety-eight and eighty-five one hundredths (98.85) feet; thence along the northerly wall of the building known as the "Schleier Block," and of the office and boiler room addition thereto, upon the outside thereof, one hundred and twenty-five (125) feet to the alley in said block; thence northeasterly along the said alley nineteen (19) feet; thence at right angles in a northwesterly direction thirty-six and fifteen one hundredths (36.15) feet; thence in a northeasterly direction in a straight line to a point on the line of Sixteenth Street, which is eighty-eight and ninety-seven one hundredths (88.97) feet southeasterly from Lawrence Street; thence northwesterly along the line of Sixteenth Street eighty-eight and ninety-seven one hundredths (88.97) feet to the place of beginning, being parts of lots one (1) two (2), three (3), and four (4), in block seventy-five (75) aforesaid; Provided, however, that no part of the realty now occupied by either the so-called "Schleier Block" or the office and boiler room addition thereto, or the old "Tribune Building," is hereby demised or let.

To have and to hold the said above demised premises, unto the said party of the second part, its successors and as-
9 signs, for the term of ninety-nine (99) years, from the first day of February, in the year of our Lord one thousand eight hundred and ninety, for and during and until the first day of February in the year of our Lord one thousand nine hundred and eighty-nine.

And the said party of the second part, in consideration of the leasing of the premises aforesaid, covenants and agrees for itself, its successors and assigns, with the said party of the first part, his heirs, personal representatives, and assigns, to pay to the said party of the first part, his heirs or assigns, as rent for the said demised premises the sum of thirteen thousand nine hundred and seventy-five ($13,975.00) dollars for each year during said term of ninety-nine years (99); said sum of thirteen thousand nine hundred and seventy-five ($13,975.00) dollars to to be paid in twelve equal instalments each year, the first instalment of eleven hundred sixty-four and fifty-eight hundredths ($1164.58) dollars to be paid on or before the fifteenth day of February, A. D. 1890, and then an instalment of eleven hundred sixty-four and fifty-eight hundredths ($1164.58) dollars on or before the fifteenth day of each and every month thereafter during said term.

The said party of the second part, its successors and assigns, in consideration of said letting as aforesaid, covenant and agree with the said party of the first part, his personal representatives heirs and assigns, that they will on or before the first day of May, A. D. 1890, remove or cause to be removed, at their own cost and expense, the store rooms now situate upon said demised ground, and that they will within eighteen months from February first, A. D. 1890, at their own cost and expense, build, erect, and complete a good, substantial building, not less than four stories in height, to cost not less than one hundred thousand ($100,000) dollars, and to face on both Sixteenth and Lawrence Streets, provided that the party of the first part shall give, or cause possession of said premises to be given to the party of the second part on or before the said first day of February, A. D. 1890, and neither rent nor the other covenants of this lease shall be operative against said party of the second part until such possession is given; and provided further, that the time allowed herein for the removal of said store buildings now on said premises, and for the erection of said building as aforesaid, shall be extended for the period of time said possession may be withheld from said party of the second part after February first, A. D. 1890. And it is further agreed and covenanted, that said building and improvements erected or made upon said premises shall at once become a part of the realty, that is to say, of the real estate hereinbefore demised, without any right on the part of any one whomsoever to remove the same or any part thereof, except for the purpose of remodelling, rebuilding, or improving the same.

And the said party of the second part, its successors and assigns, covenant and agree that they will, from time to time, and at all times during the continuance of this lease, keep any and all buildings and improvements which may be erected or made upon said demised premises in good order and repair at their own expense, and further, that, at the expiration of said ninety-nine (99) years, or fifty (50) years thereafter, if the same shall be extended as herein provided, they will peaceably and quietly leave, surrender, and yield up to the said party of the first part, his heirs and assigns the said demised premises, together with any and all buildings and improvements erected and made thereon.

And the said party of the second part, its successors and assigns, covenant and agree with said party of the first part, his heirs and assigns that they will, at their own expense, from time to time, and at all times during the continuance of this lease, insure any and all buildings and improvements to be erected on said premises from casualties by fire, for a sum not less than one-half of the then value of such buildings and im-

provements. And the said parties hereto agree, that in case of loss or damage by fire, if the same amount to one-fourth of the then value of said building or buildings or more, the said insurance shall be paid to some trustee to be appointed by a court of competent jurisdiction, upon application of either of the parties hereto, to be held by him for the purpose of reinvesting and applying the same in and to repairing and replacing said building or buildings, and the policies issued for the insurance of said building or buildings shall contain a clause or provision that the moneys to be paid thereunder in case of loss or damages as aforesaid, shall be paid and applied
11 as herein provided in case the loss or damage exceeds one-fourth of the value of said building or buildings, or more, as aforesaid. Should such sum, however, not be sufficient to repair or replace such building or improvements so damaged or destroyed, then and in that event the additional sum of money necessary to that end and for that purpose, shall be advanced and paid by the said party of the second part, its successors and assigns, and the building so damaged or destroyed by fire shall immediately and without any delay be restored and rebuilt by said party of the second part, its successors and assigns; provided, that in case of destruction of said building by fire, the cost of replacing the same need not be in excess of the value of the building destroyed at the time of its destruction.

And the said party of the second part, its successors and assigns, also covenant and agree with the said party of the first part, that they will on or before the first day of April, or before the property or any part thereof shall be advertised for sale, of each and every year during the existence of this lease, well and truly pay or cause to be paid, at their own cost and charges all rates, taxes, and assessments of whatsoever kind and nature, as shall or may from the first day of February, A. D. 1890, and during the term of ninety-nine (99) years hereby created, be lawfully imposed, levied on, charged or assessed upon and growing out of said demised premises. And if at any time after any such rate, tax or assessment shall have become due or payable, the party of the second part, its successors or assigns, shall neglect to pay such rate tax or assessment, it may be lawful for the party of the first part to pay the same at any time thereafter, and the amount of any and all such payments so made by the party of the first part shall be deemed and taken as, and is hereby declared to be so much further and additional rent for the above demised premises, to be immediately due from and payable by the said party of the second part, and the same may be collected as other rent, and in addition thereto whatever penalty or forfeiture is herein provided for the non-payment of rent, shall also exist and be available to

the party of the first part, and operate against the party of the second part, its successors and assigns, for the non-pay-
12 ment of any such rate, tax, or assessment, as herein provided.

It is expressly understood, agreed, and covenanted by and between the parties hereto, that if the rent above reserved, or any part thereof, shall be behind and remain unpaid for the period of fifteen days (15) after the same ought to be paid as aforesaid, or if default shall be made in any of the covenants or agreements herein contained, to be kept or performed by the said party of the second part, its successors or assigns, it shall and may be lawful for the party of the first part, his heirs, executors, administrators, agent, attorney or assign at his or their election and the said party of the first part, his heirs, personal representatives or assigns, shall have and are hereby given the right, power, and authority at any time after thirty days' notice (said notice to be served personally, if personal service can be had in the said city of Denver, but if such personal service can not be had, upon said party of the second part its successors or assigns in said city of Denver, then said notice to be mailed at the said city of Denver to the last known place of residence of the said party of the second part, its successors or assigns, as the case may be), to sell and dispose of this lease, and all the right, title, benefit and equity which the party of the second part, its successors and assigns may have in and to the same, and in and to the said demised premises, together with all improvements thereon, at public auction, at the front door of the County Court House in the City of Denver, County of Arapahoe and State of Colorado, or at the said demised premises at one of the front doors thereof, for the highest and best price the same will bring in cash, thirty days public notice having been previously given of the time and place of such sale, by advertisement in one of the morning daily newspapers at that time published in said city of Denver, and to make, execute, and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for, or assignment of the said lease so sold, and of all the right, title, benefit, and equity of the said party of the second part, its successors and assigns thereunder and in said demised premises, and out of the proceeds or avails of such sale, and the purchase money paid thereon, after first paying all costs of advertising said sale, commissions and other
13 expenses, including all moneys advanced for taxes or other liens and assessments, and all rents due at the time of such sale, with interest thereon, to pay the overplus (if any) unto the said party of the second part, its successors and as-

signs on reasonable request. And it shall not be obligatory upon the purchaser or purchasers at any such sale, or subsequent sale or sales, to see to the application of the purchase money, which sale or sales so made, shall be a perpetual bar, both in law and equity, against the said party of the second part, its successors and assigns, and all other persons claiming the demised premises aforesaid, or any part thereof, by, from, through, or under said party of the second part, its successors or assigns or any of them, and either the first or second party hereto, their heirs, administrators, successors, or assigns, may become the purchaser of said lease, and of all the rights of the said party of the second part, its successors and assigns thereunder, and in said demised premises. And the said party of the second part, its successors and assigns, do hereby covenant and agree to surrender and deliver up the said above described premises and property peaceably, to the purchaser or purchasers of said lease, and of all the right, title, benefit and equity of the said party of the second part, its successors and assigns therein; and if the said party of the second part, or its legal representatives and assigns, shall remain in possession of the same thirty days after the termination of this lease, as before provided, or ten days after any sale of said lease and of the right, title, benefit, and equity of the said party of the second part, its successors and assigns therein as aforesaid, he or they shall be deemed guilty of a forcible and unlawful detainer of the premises, and shall be subject to all the conditions and provisions above named, and to eviction and removal, forcible or otherwise, with or without process of law, as above set forth.

It is further understood and agreed by and between the parties hereto, that the same rights and remedies available to the said party of the first part, his heirs, personal representatives and assigns, against the said party of the second part, its successors and assigns, under this lease shall exist and be available for default in the payment of any rent, rates, taxes,
14 or assessments reserved and to be paid under this lease, or for the breach or violation of any other covenant, condition, or agreement herein contained and to be kept and performed by the said party of the second part, its successors and assigns, against purchasers at any sale or sales made under this lease, as hereinbefore provided, their heirs, successors and assigns; and further, that said remedy of sale in case of failure to pay the rents, rates, taxes, or assessments at the time and in the manner herein provided in this lease, or in case of a breach or violation of any other covenant, condition, or agreement herein contained, to be kept or performed by the said party of the second part, its successors or assigns, shall exist

whenever there may be a default in the payment of the rent, rates, taxes, or assessments as herein provided, or a breach or violation of any agreement, covenant, or condition herein contained, notwithstanding one or more sales may have been had under the provisions hereof, said power of sale to be a continuing one until this lease shall have been terminated, but said remedy of sale shall not be construed as preventing the said party of the first part, his heirs, executors, administrators, agent, attorney, or assign from maintaining a personal action or actions to recover any rents becoming due hereunder or for moneys paid out on account of rates, taxes, or assessments on said demised premises.

It is further agreed and covenanted that any purchaser or purchasers of this lease, or of the right, title, and interest of said party of the second part, its successors and assigns, in said demised premises, at any sale or sales made hereunder as herein provided, their heirs, personal representatives, successors and assigns, shall take and hold said lease and said demised premises subject to all the agreements covenants and conditions, and the same rent to be paid, kept, and performed by the said party of the second part, its successors and assigns, and that all rights and remedies herein reserved or available to said party of the first part, his heirs, personal representatives and assigns, shall and are hereby expressly reserved to said party of the first part, his heirs, legal representatives and assigns, against any purchaser or purchasers at the first sale made hereunder, and against any purchaser or purchasers at any such subsequent sale or sales, their heirs, personal representatives, successors and assigns. For further identification a plat of the realty demised herein is hereto attached and made a part hereof, said plat being drawn on a scale of sixteen feet to the inch.

The said party of the second part, for itself, its successors and assigns, covenants and agrees to and with the said party of the first part, his heirs personal representatives and assigns, that it will not erect or cause or permit to be erected any part of said building upon that portion of the said demised premises included within the red lines shown upon said plat above the level of the 16th street grade, and said party of the second part, its successors and assigns, further covenant and agree that that portion of the said demised premises included within the said red lines shall remain open and unobstructed for the purpose of light and air for the said building proposed to be erected by the said party of the second part, its successors or assigns, as well as for the buildings now situate upon and owned, and which may be erected hereafter, by the said party of the first part, his heirs and assigns, upon the parts of said

lots one (1), two (2), three (3), and four, not hereby demised, and upon lots five (5) and six (6) all in said block seventy-five (75) in the East Division of said city, and that the said premises within the said red lines shall not be used for the purpose of storage of personal property of any kind; said premises included within said red lines being described as follows, to wit:

Commencing at a point on the outside line of the northeasterly wall of the said "Schleier Block" which is twenty-four (24) feet and six inches distant from Lawrence Street; thence in a southeasterly direction along the said outside line of said wall to a point which is eighty-eight and eighty-five one hundredths (88.85) feet distant from said Lawrence Street; thence at right angles in a northeasterly direction to a point on the outside line of the wall of the said "Tribune Building," and which point is forty-one (41) feet distant from Sixteenth Street; thence at right angles parallel with Sixteenth Street and in a northwesterly direction six (6) feet; thence at right angles parallel with Lawrence Street in a southwesterly direc-
16 tion to a point six (6) feet from the outside line of said wall of said "Schleier Block," thence at right angles parallel with Sixteenth Street towards Lawrence Street, to a point which is twenty-four (24) feet and six (6) inches distant from said Lawrence Street; thence at right angles to the point of beginning.

It is further understood and agreed by and between the parties hereto, that that portion of said demised premises included within the blue lines, as shown upon said plat, may be excavated, and that portion thereof beneath the official grade shall be for the exclusive use of the said party of the second part, its successors and assigns, that on the northeasterly side of said strip, the said party of the second part will erect or cause to be erected, at its own cost and expense, a foundation wall such as will be put in elsewhere for the building to be erected upon said demised premises the stone pillars of which said wall below the surface or official grade, shall rest six inches upon said strip, and that said wall is to be the exclusive property of the said party of the first part, except as it serves as an inclosing wall for the excavation to be made, that said excavation is to be covered in a substantial way by flag-stone, or other equally substantial covering, and after so covered, said strip, except the portion under said cover is to be left open and used as a private way for the building to be erected as aforesaid, as well as for the buildings now owned by the said party of the first part, and the buildings which may be erected hereafter by the said party of the first part, his heirs and assigns, upon any portion of said lots one (1),

two (2), three (3), four (4) five (5) and six (6) not hereby demised said strip in this paragraph referred to being described as follows, to wit:

Commencing at a point where the outside line of the northeasterly wall of the office and boiler room addition to the said "Schleier Block" intersects said alley; thence along said alley in a northeasterly direction nineteen (19) feet; thence at right angles parallel with Sixteenth Street in a northwesterly direction thirty-six and fifteen one-hundredths (36.15) feet; thence at right angles in a southwesterly direction nineteen (19) feet; thence at right angles in a southeasterly
17 direction thirty-six and fifteen one hundredths (36.15) feet to the place of beginning, being a strip of land nineteen (19) feet on said alley, by thirty-six and fifteen one hundredths (36.15) feet adjoining the office and boiler room addition to the said "Schleier Block."

It is further understood and agreed that no rights to any water from the artesian well located in the alley in said block seventy-five (75) shall pass hereunder.

The said party of the second part, its successors and assigns, further covenant and agree to and with the party of the first part that they will protect the walls of the so-called "Schleier Block" and of the office and boiler room addition thereto, and the walls of the "Tribune Building" adjoining the premises demised herein, and will save said party of the first part, his personal representatives, heirs, and assigns, harmless from any and all damage of whatsoever name and nature he or they may sustain by reason of any excavation for any building or improvements to be erected or made upon said demised premises.

The party of the first part further covenants and agrees, that the party of the second part, its successors and assigns, shall have the right to construct the footings for all foundation walls for its building beneath the foundation walls of the said "Schleier Block" and boiler room addition and the "Tribune Building" and to enter both of said buildings for the purpose of doing what may be necessary to properly support and maintain the walls and foundation of said block and buildings, provided the said party of the second part, its successors and assigns, shall do the same in a skillful and workmanlike manner, and said party of the second part, its successors and assigns, shall have said right and privilege without any additional cost or charge therefor.

It is further covenanted and agreed by and between all the parties hereto, that all the agreements, conditions and cove-

nants in this lease shall be binding upon the heirs, personal representatives, successors and assigns of the respective parties hereto.

And the said party of the first part, for himself, his heirs, executors and administrators, covenants and agrees to and with said party of the second part, its legal representa-
18 tives, successors or assigns, that at the time of the ensealing and delivery of these presents he is well seized of said premises in fee simple, and has good right, full power and lawful authority to let and demise the same in manner and form as aforesaid, and that the same are free and clear of all liens and encumbrances whatever.

It is expressly understood and agreed, that at the option of said party of the second part, its successors or assigns, the said party of the first part hereby agrees to extend this lease for a further term of fifty (50) years from the term of ninety-nine (99) years hereinbefore mentioned, at the same rent, and upon the same terms, conditions, agreements, and covenants herein contained;

Provided, however, that ninety (90) days' notice, prior to the expiration of said ninety-nine (99) years shall be given by the said party of the second part, its successors or assigns to the said party of the first part, his representatives, heirs, or assigns, of their intention to avail themselves of said option.

In Testimony Whereof the said party of the first part has hereunto set his hand and seal, and the said party of the second part has caused these presents to be signed by its president, attested by its cashier thereunto duly authorized, and its corporate seal to be hereunto affixed, all in duplicate, the day and year first above written.

[Seal] GEORGE C. SCHLEIER,

THE PEOPLES NATIONAL BANK OF DENVER,

By M. J. Lawrence, President.

Attest: C. Y. McCLURE, Cashier.

(Bank seal.)

The words, "above the level of the sixteenth street grade" and "the parts of" on page 11 and the words "and boiler room addition" on page 14 were interlined in writing before execution.

GEORGE C. SCHLEIER.
M. J. LAWRENCE, Pt.

Attest: T. M. PATTERSON
G. C. BARTELS
J. H. BLOOD.

State of Colorado,
County of Arapahoe—ss.

George C. Schleier appeared before me this fourteenth day of September, A. D. 1889, in person, and acknowledged the foregoing instrument to be his act and deed for the uses specified therein; and that M. J. Lawrence, as president, and Charles Y. McClure as Cashier, respectively, of The Peoples National Bank of Denver, appeared before me this fourteenth day of September, A. D. 1889, in person, and acknowledged the foregoing instrument to be the act and deed of The Peoples National Bank of Denver aforesaid, for the uses specified therein.

My commission expires May 18th, 1893.
Witness my hand and official seal.
[Seal] CARLOS WOOD,
Notary Public.

10. That, acting under and by virtue of said alleged pretended lease, and in accordance with the provisions thereof, and not otherwise, the said national banking association took possession of said premises on or about the first day of February, A. D. 1890, and thereafter, in alleged pretended accordance with the provisions of said alleged pretended lease erected upon the premises therein described a large and commodious office and store building, occupying the whole of said premises, as stipulated by said alleged pretended lease.

11. That said building (which, for convenience and brevity in reference will be hereinafter styled the "Bank Building"), was built of brick, stone, steel, iron, and timber, and consisted of eight stories or floors above the cellar, and was constructed according to and was fitted with the latest modern im-
20 provements in building such as gas and electricity, hot and cold water, two elevators, steam heating apparatus, and cost over the sum of the said capital stock of said defendant bank, that is to say, over the sum of three hundred thousand dollars ($300,000), viz, about the sum of three hundred and five thousand seven hundred and twenty-five and thirty-nine hundredths dollars ($305,725.39) all of which was done with the full knowledge, consent, and approval of said defendant Schleier.

12. That said bank building contained a large number of store and office rooms, viz: Six (6) store rooms on the ground floor, two (2) very large store or banking rooms, fitted with burglar-proof vaults, on the second or main floor, and about eighty-four (84) offices in the remaining stories thereof, and was built and adapted for being rented as a store and office building, as a real estate speculation, and was not confined to such a banking house or building as should be necessary for its

the said defendant bank's immediate accommodation in the transaction of its business, and for no other purpose, as by the said National Bank Act, provided.

13. That thereafter, and on or about the month of January, A. D. 1891, the said bank building having been completed and prepared for occupation, said defendant national banking association moved its place of business into the said building, and thereafter, at all the times hereinafter mentioned, used and occupied one-half of the first or main floor for the
21 transaction of its said banking business as well as the banking business of another corporation, created and existing under the laws of the State of Colorado, known as and called The People's Savings Bank; and thereafter rented, for pecuniary profit, as a real estate speculation, the rest, residue and remainder of the said building.

14. That thereafter, at all the times hereinafter mentioned the said defendant banking association continued in the ordinary conduct of its business as a national banking association and in the renting of the office rooms and stores in said building, conducting the same as a real estate speculation, until on or about the 19th day of July, A. D. 1893.

15. That on or about the 19th day of July, A. D. 1893, the said defendant banking association being unable to pay its depositors in the due course of business, in accordance with the provisions of said National Bank Act in such case made and provided, it was placed in the hands of the Comptroller of the Currency, and one J. B. Lazear was appointed to and did take charge of said bank, and its affairs, and acted as receiver thereof, until on or about the 21st day of August, A. D. 1893, and that thereafter, and at all the times hereinafter mentioned, as this plaintiff is informed and believes, and so charges the fact to be, the said defendant banking association was and still is insolvent.

16. That at all the times last aforesaid, prior, on, and subsequent to being placed in the hands of the Comptroller
22 of the Currency of the United States, it was discovered that the assets, business and affairs of the said defendant National Bank were very much involved with those of said The People's Savings Bank, with whom it was associated and doing business in the same banking room in said bank building, and that after so going into the hands of said J. B. Lazear, as receiver, the said defendant National Bank proceeded to wind up its affairs and dissolve as a banking association.

17. That thereafter, and on or about the 20th day of September, A. D. 1897, said defendant National Banking Association, in furtherance of its determination to liquidate, dissolve and wind up its affairs, issued a notice and called a special stockholders' meeting, of which the notice thereof was in words and figures as follows, to wit:

Stockholders' Meeting of the People's National Bank of Denver.

Notice is hereby given that a special meeting of the stockholders of The People's National Bank of Denver, Colorado, will be held at the banking room of said bank, on the 30th day of October, 1897, at 2 o'clock p. m. to consider a proposition to turn over the banking house of the said bank to George C. Schleier, the owner of the land on which the building is situated.

Owing to the fact that the income of the property is less than the fixed charges, it has become necessary to take some action to relieve the bank. It is important that all stockholders be present or duly represented. If you can not be present, please sign the enclosed proxy and return same to cashier at once. If you have no other, the name of Biddle Reeves is suggested for proxy.

By order of the board of directors.

23 Denver, September 20, 1897.

M. J. LAWRENCE, President.

J. H. CLEMES, Cashier.

18. And on the 28th day of September, A. D. 1897, said defendant National Banking Association, for the purposes aforesaid, issued another and further notice calling a special stockholders' meeting of which the notice thereof was in words and figures as follows, to wit:

Stockholders' Meeting of the People's National Bank.

Notice is hereby given that a special meeting of the stockholders of the People's National Bank of Denver, Colo., will be held at the banking room of said bank on the 30th day of October, 1897, at 2 o'clock p. m. to consider the advisability of the present stockholders, with such other persons as may desire to do so, organizing a corporation under the laws of the State of Colorado to control the bank's assets, and to perform such other acts as may be contemplated in the certificate of incorporation of such new company.

A reorganization, such as contemplated, with a small capitalization, will be a great saving to the stockholders in reducing the amount of taxes now paid by the bank.

If you can not be present at the meeting in person, kindly sign the inclosed proxy to Mr. Biddle Reeves, and mail to the undersigned.

THE PEOPLE'S NATIONAL BANK,
By M. J. Lawrence, President.

Denver Colo., September 28, 1897.

18. And on the ..... day of December, A. D. 1897, said defendant National Banking Association, for the purposes aforesaid, issued another and further notice, calling an annual stockholders' meeting, of which the notice thereof was in words and figures as follows, to wit:

24 Annual Stockholders' Meeting.

You are hereby notified that the annual meeting of the stockholders of the People's National Bank of Denver, Colorado, will be held in room 801, People's Bank Building, Denver, Colo., at 10 o'clock a. m. Tuesday, January 11, 1898.

At this meeting there will be an election of a board of directors for the ensuing year, and a proposition will then be submitted to wind up the business of the People's National Bank, and to make some suitable disposition of its assets; and such other business will be transacted as may be necessary or proper.

Please fill out enclosed proxy and mail to undersigned.

JAMES H. CLEMES, Cashier.

801 People's Bank Building, Denver, Colo.

19. And plaintiff further alleges that said banking house referred to in said stockholders' notice was the said banking house herein referred to in the allegations of this bill.

20. And plaintiff further alleges that for a long time prior to the giving of said stockholders' notice the said banking association and its officers and agents neglected the business of attending to the renting of the stores, offices, and rooms in said Bank Building, and neglected to keep the same in good order and repair, and brought the same into disrepute and allowed it to run down, and allowed the rents thereof to remain uncollectedand the taxes thereon toremain unpaid and also diverted the moneys and income received from the renting of the offices, stores, and rooms in said Bank Building to other purposes than the payment of the rent and the taxes and charges, repairs and expenses of taking care of said
25 Bank Building, so that on or about the 30th day of October, A. D. 1897, there was due and owing to the said defendant George C. Schleier, as rent under said alleged pretended lease, for the months of August, September, and October, A. D. 1897, the sum of eleven hundred and sixty-four

dollars and fifty-eight cents ($1164.58) due August 15th, 1897, the sum of eleven hundred and sixty-four dollars and fifty-eight cents ($1164.58) due September 15th, A. D. 1897, and the sum of eleven hundred and sixty-four dollars and fifty-eight cents ($1164.58) due the 15th day of October, A. D. 1897, and also the further sum of twenty-four hundred and eighteen dollars and five cents ($2418.05) due on account of the second half of the general taxes levied upon said premises for the year A. D. 1896, and also the sum of fifty-six dollars and forty cents ($56.40) due on account of an assessment made against said demised premises for the paving of the alley in the rear thereof, all of which said rents, taxes, and assessments the said defendant bank failed and neglected to pay, and permitted to remain unpaid.

21 Plaintiff further alleges that he is informed and believes and so charges the fact to be, that although it was and is represented in said notice calling said stockholders' meetings hereinbefore set forth, and also at the meetings of said stockholders, held in pursuance of said notices and by the officers of said defendant banking association, and by the attorneys and agents of said defendant Schleier, present
26 at said Stockholders' meetings, that the income of said property, meaning said Bank Building, was less than the fixed charges, in truth and in fact such was not the case, but that the rents and income from said property in the neglected condition in which it then was, because of the misconduct and neglect of the said banking association and its officers and agents to care for and look after the renting of the same and the collection of the rents and its maintenance, were, as this plaintiff is informed and believes, and so charges the fact to be, sufficient to pay the rents, and all charges due and required to be paid under the said alleged pretended lease, and to keep and maintain the said Bank Building in good order and repair.

22. Your orator further complaining alleges that said defendant banking association thereafter, and in violation of the statutes of the United States in such case made and provided, and contrary to the principles of equity governing the distribution and disposition of assets and payment of dividends on the dissolution of insolvent corporations, in consideration of being released from the obligation of paying such taxes and assessments under said alleged pretended lease upon said demised premises, and especially the said rent that had accrued for the said months of August, September, and October, A. D. 1897, and the second half of taxes for the year A. D. 1896, and the said alley assessment, and in virtue of the further consideration that he, the said Schleier, should release said

bank and all its stockholders from any and all liability which might thereafter accrue against them or either of them
27 under and by virtue of the covenants and conditions of said alleged pretended lease, and in consideration of the said defendant Schleier accepting as rent for the said demised premises for the month of October, A. D. 1897, the rents accruing from the tenants of said bank in said building, less the expense of running said building for said month, did pretend, by instruments in writing, to bargain, sell, assign, transfer, convey, surrender and yield up unto the said defendant Schleier his heirs and assigns, the said alleged pretended lease of the said demised premises therein described, including the improvements and the said bank building situate thereon and the term of years in said alleged pretended lease yet to come, and did cancel said alleged pretended lease, and did also, on or about said 30th day of October, A. D. 1897, surrender and deliver to the said Schleier the possession of the said premises, together with said bank building, and that ever since the 30th day of October, A. D. 1897, the said defendant Schleier has been and still is in the occupation and possession of the said premises, and said Bank Building, and claims to be the owner in fee simple thereof, free from any claim, right, title, or interest of any kind on the part of said defendant The People's National Bank of Denver, therein and thereto; that said instruments of writing purporting to make said surrender and cancellation of said lease and of the possession of said Bank Building, bore date October 30th, A. D. 1897, and were recorded on the 8th day of November, A. D. 1897, in book 1211, at
28 pages 98 and 100 thereof, in the office of the clerk and recorder of said Arapahoe County.

23. That said last mentioned instruments were and are in words and figures as follows, to wit:

Release of Lease.

Peoples Nat. Bank to George C. Schleier. Filed for record at 11:10 o'clock a. m., November 8th, 1897.

R. LeBERT, Recorder.

Whereas by lease or indenture dated September 12th, 1889, and recorded in book 547 commencing at page 1, of the records in the office of the clerk and recorder of Arapahoe County, State of Colorado, George C. Schleier demised and leased to the Peoples National Bank of Denver, those certain premises described in said lease, situate in the city of Denver, County of Arapahoe and State of Colorado, and also described as follows, to wit:

Commencing at the most northerly corner of lot one (1) in block seventy-five (75) in the east division of the city of Denver, thence southwesterly along Lawrence street ninety-eight and eighty-five one hundredths (98.85) feet thence along the northerly wall of the building known as "Schleier's Block" and the office and boiler room addition thereto, upon the outside thereof, one hundred and twenty-five (125) feet to the alley in said block; thence northeasterly along the said alley nineteen (19) feet; thence at right angles in a northwesterly direction thirty-six and fifteen one hundredths (36.15) feet thence in a northeasterly direction in a straight line to a point on the line of Sixteenth Street, which is eighty-eight and ninety-seven one hundredths (88.97) feet southeasterly from Lawrence Street; thence northwesterly along the line of Sixteenth Street eighty-eight and ninety-seven one-hundredths (88.97) feet to the place of beginning; being part of lots one (1) two (2), three (3), four (4), in block seventy-five (75) upon which premises is now situate the building known as the Peoples Bank Building.

29 Now, know all men by these presents: That the said The Peoples National Bank of Denver, doing business in the city of Denver, and organized under the national banking laws of the United States, in consideration of the said George C. Schleier releasing the said bank and its stockholders from the payment of the August and September 1897 rent for said premises and from the payment of the second half of the 1896 taxes against the same and the alley paving assessment against the same, and in further consideration that the said George C. Schleier releases said bank and all of its stockholders from any and all liabilities which may hereafter accrue against them, or either of them under and by virtue of any of the covenants or conditions of said lease, and in the further consideration of the said George C. Schleier accepting as rent for the month of October, 1897, the rents accruing from tenants in said building, less the expense of running the building for said month, has and hereby does bargain, sell, assign, transfer, convey, surrender and yield up unto the said George C. Schleier, his heirs and assigns, said lease and said premises therein and hereinbefore described, including the improvements and the building situate thereon and the term of years in said lease yet to come.

And it is further covenanted and agreed that said lease is hereby cancelled.

In Witness Whereof the said The Peoples National Bank of Denver has caused these presents to be signed in its name by Biddle Reeves, Chairman and Presiding Member and J. H. Clemes, its cashier and its corporate seal to be hereunto affixed this 30th day of October, A. D. 1897.

[Corporate Seal] THE PEOPLES NATIONAL BANK OF DENVER,
By Biddle Reeves,
Chairman and Presiding Member and
J. H. Clemes, its Cashier.

State of Colorado,
County of Arapahoe—ss.

I, Frank N. Bancroft, a notary public in and for said county, do hereby certify that Biddle Reeves, as chairman and presiding member, and J. H. Clemes, as cashier of the Peoples
30 National Bank of Denver, and who are personally known to me to be the persons whose names are subscribed to the foregoing instrument in writing, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the same as the free and voluntary act of the said The Peoples National Bank of Denver for the uses and purposes therein set forth.

My notarial commission expires October 15th, 1898.
Witness my hand and seal this 30th day of October, A. D. 1897.

[Notarial Seal] FRANK N. BANCROFT,
Notary Public.

Release of Lease.

Peoples Nat. Bank to George C. Schleier. Filed for record at 1:25 o'clock p. m., November 8th, 1897.

R. LeBERT, Recorder.

Whereas by lease or indenture dated September 12th, 1889, and recorded in book 547 commencing at page 1, of the records in the office of the clerk and recorder of Arapahoe County, State of Colorado, George C. Schleier demised and leased to the Peoples National Bank of Denver, those certain premises described in said lease, situate in the city of Denver, County of Arapahoe and State of Colorado, and also described as follows, to wit:

Commencing at the most northerly corner of lot one (1) in block seventy-five (75) in the east division of the city of Denver, thence southwesterly along Lawrence street ninety-eight and eighty-five one hundredths (98.85) feet thence along the northerly wall of the building known as the "Schleier Block"

and of the office and boiler room addition thereto, upon the outside thereof, one hundred and twenty-five (125) feet to the alley in said block; thence northeasterly along the said alley nineteen feet; thence at right angles in a northwesterly direction thirty-six and fifteen one hundredths (36.15) feet; thence in a northeasterly direction in a straight line to a point on the line of Sixteenth Street, which is eighty-eight and ninety-seven one hundredths (88.97) feet southeasterly from Lawrence Street; thence northwesterly along the line of Sixteenth Street eighty-eight and ninety-seven one-hundredths (88.97) feet to the place of beginning being part of the lots one (1) two (2)
31 three (3) and four (4) in block seventy-five (75) upon which premises is now situate the building known as the Peoples Bank Building.

Now, know all men by these presents: That the said The Peoples National Bank of Denver, doing business in the city of Denver, and organized under the national banking laws of the United States, in consideration of the said George C. Schleier releasing the said bank and its stockholders from the payment of the August and September, 1897, rent for said premises and from the payment of the second half of the 1896 taxes against the same and the alley paving assessment against the same, and in the further consideration that the said George C. Schleier releases said bank and all of its stockholders from any and all liabilities which may hereafter accrue against them, or either of them, under and by virtue of any of the covenants or conditions of said lease, and in the further [condition] of the said George C. Schleier accepting as rent for the month of October, 1897, the rents accruing from tenants in said building, less the expenses of running the building for said month, has and hereby does bargain, sell, assign, transfer, convey, surrender and yield up unto the said George C. Schleier, his heirs and assigns, said lease and said premises therein and herebefore described, including the improvements and the building situate thereon and the term of years in said lease yet to come.

And it is further covenanted and agreed that said lease is hereby cancelled.

In Witness Whereof the said The Peoples National Bank of Denver has caused these presents to be signed in its name by M. J. Lawrence, its president, and J. H. Clemes, its cashier, and its corporate seal to be hereunto affixed, this 30th day of October, A. D. 1897.

[Corporate Seal] THE PEOPLES NATIONAL BANK OF DENVER,
By M. J. Lawrence, its President, and
J. H. Clemes, its Cashier.

State of Ohio,
County of Cuyahoga—ss.

I, Mahlon M. Chew, a Notary Public in and for said county, do hereby certify that M. J. Lawrence, as President of
32 The Peoples National Bank of Denver, and who is personally known to me to be the person whose name is subscribed to the foregoing instrument in writing, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the same as the free and voluntary act of the said The Peoples National Bank of Denver, for the uses and purposes therein set forth.

My Notarial Commission expires December 8th, 1898.
Witness my hand and seal this 30th day of October, A. D. 1897.

[Notarial Seal] MAHLON M. CHEW,
Notary Public.

State of Colorado,
County of Arapahoe—ss.

I, Frank N. Bancroft, a Notary Public in and for said County, do hereby certify, that J. H. Clemes, as Cashier of the Peoples National Bank of Denver, and who is personally known to me to be the person whose name is subscribed to the foregoing instrument in writing, appeared before me this day in person and acknowledged that he signed, sealed and delivered the same as the free and voluntary act of the said the Peoples National Bank of Denver, for the uses and purposes therein set forth.

My notarial commission expires October 15th, 1898.
Witness my hand and seal this 8th day of November, A. D. 1897.

[Notarial Seal] FRANK N. BANCROFT,
Notary Public.

24. Your orator further alleges that thereafter and on or about the 30th day of November, A. D. 1899, at the September Term of the Honorable District Court, a court of record of the said State of Colorado, sitting in and for the County of Arapahoe in said state, in a certain cause pending therein, commenced by the service of summons and copy of the complaint on or about June 26th, A. D. 1897, one Fermor J. Spencer, as Assignee of said Peoples Savings Bank, as plaintiff, and said National Banking Association as defend-
33 ant, a judgment was rendered in favor of said plaintiff and against the said defendant, for the sum of four hundred and seventy-five thousand eight hundred and twenty-five dollars and seventy-one cents (475,825.71). That the pendency of said action wherein said judgment was rendered, was

well known by said defendant Schleier at the time of said alleged pretended surrender and cancellation of said alleged pretended lease of said premises.

25. That thereafter, by an instrument bearing date the 20th day of December, A. D. 1899, the Honorable Comptroller of the Currency of the United States having become satisfied of the insolvency of the said defendant national banking association, he did then and there, in pursuance of the said National Bank Act, and on or about the 20th day of December, A. D. 1899, appoint your orator, the plaintiff herein, as receiver of said defendant national banking association, the People's National Bank of Denver, Colorado, and authorized and directed the closing up and winding up of all the business and affairs of said association.

26. That thereupon this plaintiff duly qualified, and at all times thereafter hereinafter mentioned was, and still is, the receiver of said defendant national banking association, The People's National Bank of Denver, Colorado.

27. Your orator further alleges on information and belief, and so charges the fact to be, that said judgment has been paid only in part.

34 28. That thereafter, viz, on or about the 27th day of October, A. D. 1900, and prior to the commencement of this action, said the Honorable Comptroller of the Currency of the Treasury of the United States authorized, empowered and directed this plaintiff to commence and diligently prosecute this action, and this suit is commenced and [prosecured] in accordance with the said order and direction of an officer of the United States, to wit, the said Comptroller of the Currency of the United States.

29. And your orator avers that he is ready and willing and hereby offers to do and perform whatever shall be deemed by this Honorable Court to be equitable and conscionable under all the circumstances, as may be decreed and ordered upon a final hearing of this suit.

30. Wherefore, your orator prays, that forasmuch as he is without any adequate remedy at law in the premises, that the said defendants may be compelled to answer all and singular the premises in this bill of complaint contained, but not under oath, the answer under oath of said defendants and each of them being expressly hereby waived.

2d. And your orator further prays that a writ of subpoena may issue out of and under the seal of this Honorable Court,

and directed to the said George C. Schleier and the Peoples National Bank of Denver, Colorado, a national banking association who, are made defendants to this, your orator's
35 bill of complaint, commanding him and the said corporation by a certain day to be named, to appear before this court, and then and there answer the premises and abide the order and decree of the court.

3d. Your orator, upon final hearing, further prays for a decree declaring and adjudging the said alleged pretended lease purporting to have been made between the said national banking association, The People's National Bank of Denver, Colorado, and said defendant George C. Schleier, dated on or about September 12th, 1889, and recorded on or about September 21st, A. D. 1889, in book 547, at page 1 and following pages of the records in the office of the clerk and recorder of said Arapahoe County, State of Colorado, and also the said alleged pretended instruments of writing bearing date on or about October 30th, A. D. 1897, and recorded the 8th day of November, A. D. 1897, in book 1211, at pages 98 and 100 thereof, in the office of the clerk and recorder of said Arapahoe County, purporting to cancel said alleged pretended lease and yield up and surrender the same and the premises thereby alleged to be leased, together with the said Bank Building thereon to the said defendant Schleier, and each of said instruments and transactions were and are absolutely null and void for all purposes, and ultra vires of the acts of the Congress of the United States in respect to the powers of national banks to acquire, own, and hold real estate, or to be and become indebted in the exercise of corporate powers, and that no title or right, legal or equitable, ever was or could be ac-
36 quired under the same or either thereof, by the said defendant Schleier to the said Bank Building and the appurtenances thereunto belonging or any part thereof.

4th. Your orator further prays for a full accounting in the premises.

5th. Your orator further prays for a decree declaring and adjudging that whatever shall be found to be due upon said accounting to the estate of said defendant national banking association, and to this plaintiff as the receiver thereof, shall be a first and prior lien and charge upon the said bank building and premises, viz: Upon the said lots numbered from one (1) to four (4) both inclusive, in said block numbered seventy-five (75) in the East Division of the city of Denver, and the said Bank Building and improvements thereon, and that said charge and first lien be enforced by a sale of the said lands and bank building.

6th. Your orator prays for such other and further relief as to the court shall seem meet and proper, and for costs of suit.

CRANSTON, PITKIN, & MOORE,
H. M. ORAHOOD,
J. H. BROWN,
WATTERS AND KENDALL,
Solicitors for complainant.

H. M. ORAHOOD and
JAMES H. BROWN,
Of Counsel.

State of Colorado,
County of Arapahoe—ss.

Earl M. Cranston, being duly sworn, on his oath deposes and says: That he is the complainant in the above en-
37 titled suit; and that he is the receiver of the People's National Bank, duly qualified and acting as such; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge in substance and in fact, except as to the matters and things therein stated on information and belief, and as to those he believes it to be true.

EARL M. CRANSTON.

Subscribed and sworn to before me this twentieth day of December, A. D. 1900.

My commission will expire April 11, 1904.

[Seal] CLARENCE F. POWELL,
Notary Public.

Indorsed: 4116. Earl M. Cranston, Receiver, vs. George C. Schleier. Bill of Complaint. Filed Dec. 22, 1900. Robert Bailey, Clerk. Cranston, Pitkin, and Moore, H. M. Orahood, J. H. Brown, Watters & Kendall, Solicitors for complainant.

United States of America,
District of Colorado—ss.

In the United States Circuit Court for the District of Colorado.

The President of the United States of America to George C. Schleier, and the Peoples National Bank of Denver, Colorado, a national banking association—Greeting:

You and each of you are hereby commanded, that you
38 appear before the Judges of the United States Circuit Court, for the District of Colorado, at the City of Denver, in said District, on the first Monday in February next, (it being the 4th day of February, A. D. 1901) to answer the bill of complaint of Earl M. Cranston, Receiver of The Peoples National Bank of Denver, Colorado, a national banking asso-

ciation, this day filed in the office of the clerk of said court, in said city of Denver, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the Marshal of the District of Colorado to execute, and make due return.

Witness, The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of the said Circuit Court, at the City of Denver aforesaid, this 26th day of February, in the year of our Lord, one thousand nine hundred, and of the Independence of the United States the 125th year.

[Seal] ROBERT BAILEY, Clerk.

Memorandum.

The above named defendants [—] hereby notified that unless they and each of them shall enter their appearance in the office of the clerk of said court, at the City of Denver aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed, and a decree entered accordingly.

ROBERT BAILEY, Clerk.

39 Marshal's Return.

United States of America,
District of Colorado—ss.

Denver, Jan. 3rd, 1901.

I have duly executed the within writ, by delivering to George C. Scheleier, and each of them, personally, a true copy of the within writ, at the place and time as follows, to wit: As to George C. Schleier on the 3rd day of January, A. D. 1901, at Denver, in Arapahoe County.

After diligent search I have been unable to locate any officer of The Peoples National Bank of Denver.

This writ therefore returned served as the law directs, this 3rd day of January, A. D. 1901.

DEWEY C. BAILEY, Marshal.
By Edwin H. Davis, Deputy Marshal.

Indorsed: No. 4116. (1276) United States Circuit Court, for the District of Colorado. In Chancery. Earl M. Cranston, Receiver, vs. George C. Schleier. Subpoena. Returnable to rule day, first Monday in February, A. D. 1901. Robert Bailey,

Clerk. Filed Jan. 4, 1901. Robert Bailey, Clerk. Cranston, Pitkin, and Moore; H. M. Orahood, J. H. Brown, Watters and Kendall, complainant's Sol'rs.

United States of America,
District of Colorado—ss.

40 In the United States Circuit Court for the District of Colorado.

The President of the United States of America, to The Peoples National Bank of Denver, Impleaded with George C. Schleier—Greeting:

You are hereby commanded, as you have heretofore been commanded, that you appear before the Judges of the United States Circuit Court for the District of Colorado, at the city of Denver, in said district, on the first Monday in March next, (it being the 4th day of March, A. D. 1901) to answer the bill of complaint of Earl M. Cranston as receiver of the Peoples National Bank of Denver, filed in the office of the clerk of said court in said city of Denver, on the 22d day of December, 1900, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the Marshal of the District of Colorado to execute, and make due return.

Witness, The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of the said Circuit Court, at the City of Denver, aforesaid, this 30th day of January in the year of our Lord, one thousand nine hundred and one, and of the Independence of the United States the 125th year.

[Seal] ROBERT BAILEY, Clerk.

41 Memorandum.

The above named defendant is hereby notified that unless it shall enter its appearance in the office of the clerk of said court, at the City of Denver aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against it as confessed, and a decree entered accordingly. ROBERT BAILEY, Clerk.

Marshal's Return.

United States of America,
District of Colorado—ss.

Denver, Jan. 20, 1901.

I have duly executed the within writ, by delivering to James H. Clemes as cashier of the Peoples Nat. Bank, personally, a

true copy of the within writ, on the 30 day of Jan'y, A. D. 1901, at Denver, in Arapahoe County.

This writ therefore returned served as the law directs, this 30 day of Jan'y, A. D. 1901.

DEWEY C. BAILEY, Marshal.
By Melvin Edwards, Deputy Marshal.

Indorsed: No. 4116 (1291). United States Circuit Court for the District of Colorado. In Chancery. Earl M. Cranston, as receiver &c., vs. George C. Schleier et al. Alias Subpoena. Returnable to rule day, first Monday in March, A. D. 1901. Robert Bailey, Clerk. Filed Jan. 31, 1901. Robert Bailey, Clerk. James H. Brown, of Denver, Complt's Sol'r.

42

Monday, February 4th, A. D. 1901.

Before the Clerk.

Earl M. Cranston as Receiver of The Peoples National Bank, of Denver, Colorado,

4116 vs. In Chancery.

George C. Schleier and The Peoples National Bank of Denver, Colorado.

Bill to Set Aside Lease and for an Accounting.

At this day, come Robert D. Thompson, Esquire, Gustave C. Bartels, Esquire, and James H. Blood, Esquire, solicitors of record of this court and enter their appearance herein for and on behalf of the respondent George C. Schleier.

United States of America,
State of Colorado—ss.

No. 4116.

In the Circuit Court of the United States for the District of Colorado.

Earl M. Cranston as Receiver of The People's National Bank of Denver, Colorado, a National Banking Association, Plaintiff,

versus In Equity.

George C. Schleier, and The People's National Bank of Denver, Colorado, a National Banking Association, Defendants.

43 Demurrer of the Above Named Defendant George C. Schleier to the Bill of Complaint of the Above Named Plaintiff.

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of

complaint contained to be true, in such manner and form as the same are therein set forth and alleged, doth demur to said bill and for causes of demurrer showeth:

1st. That the said bill doth not contain any matter of equity whereon this court can ground any decree or give to the plaintiff any relief against this defendant.

2nd. That the said bill doth show that the People's Savings Bank, the only creditor of said People's National Bank mentioned in complainant's bill, and also the stockholders of the said National Bank, and the United States Comptroller on whose behalf the complainant brings this bill, have each and all been guilty of such laches as to bar complainant in a court of equity from obtaining any relief herein against this defendant; it appearing from said bill of complaint that between July 19th and August 21st, 1893, said National Bank and its assets, among which were the leasehold interest and bank building mentioned in complainant's bill, were in the hands of the United States Comptroller by and through his receiver, J. B. Lazear, who, with the consent of said stockholders of said National Bank, and with the consent of said Savings
44 Bank, acquiesced in the said lease by taking no steps to invalidate the same, and by restoring said lease and bank building to said National Bank on the discharge of said Lazear as such receiver on August 21st, 1893; said bill also showing that in 1897 public notice was given for several months by the said People's National Bank of its intention to surrender the said bank building to the defendant George C. Schleier, and that no protest or objection of any kind was made thereto by the said Savings Bank or by any of the stockholders of said National Bank, or by the said United States Comptroller; said bill also showing that said lease complained of was duly recorded on, to wit, September 21, 1889, in the records of Arapahoe County, Colorado, and said bill nowhere denying that said National Bank reported the existence of this lease, and of its ownership of the said bank building, to the said United States Comptroller, and nowhere denying that such lease and bank building were mentioned as resources five times each year in the public statements required of the said National Bank by the United States National Bank Act; and said bill also showing that since December 20th, 1899, said People's National Bank has been in the hands of the said United States Comptroller by and through the complainant herein, and that until the bringing of this suit no attack has been made upon the validity of said lease, or the construction or ownership of the said bank building by the said National

Bank, or the surrender of said lease and building to this
45 defendant; said bill also showing that in consideration of the surrender of said lease and building to this defendant, this defendant on October 30th, 1897, by an instrument duly recorded November 7th, 1897, in the records of Arapahoe County, released said National Bank from past and future demands which this defendant then had and asserted against said National Bank.

Wherefore, and for divers other good causes of demurrer appearing on said bill, this defendant doth demur thereto. And he prays the judgment of this Honorable Court whether he shall be compelled to make any answer to the said bill, and he humbly prays to be hence dismissed with his reasonable costs in this behalf expended.

R. D. THOMPSON,
G. C. BARTELS, and
J. H. BLOOD,
Counsel for defendant George C. Schleier.

We hereby certify that the foregoing demurrer is in our opinion well founded in point of law.

R. D. THOMPSON,
G. C. BARTELS, and
J. H. BLOOD,
Counsel for defendant George C. Schleier.

State of Colorado,
County of Arapahoe—ss.

George C. Schleier being first duly sworn deposes and
46 says: I am one of the defendants above named, and the foregoing demurrer is not interposed for delay.

GEORGE C. SCHLEIER.

Subscribed and sworn to before me this 2nd day of March, A. D. 1901.

My commission expires Dec. 20, 1902.

[Seal] CHARLES J. BLAKENEY.
Notary Public.

Indorsed: No. 4116. United States Circuit Court. Earl M. Cranston, etc., versus George C. Schleier et al. Demurrer of Defendant Geo. C. Schleier to Bill of Complaint. Filed Mar. 2, 1901. Robert Bailey, Clerk. R. D. Thompson, Bartels and Blood, Solicitors for respondent.

66th Day. Monday, March 4th, A. D. 1901.

Present: The Honorable Moses Hallett, District Judge, and other officers as noted on the sixth day of November last past.

Earl M. Cranston as Receiver of The Peoples National Bank of Denver,

4116 vs. In Chancery.

George C. Schleier and The Peoples National Bank of Denver.

Bill to Set Aside a Lease and for an Accounting.

At this day come R. D. Thompson, Esquire, G. C. Bartels, Esquire, and James H. Blood, Esquire, solicitors of record of this court, and enter their appearance herein, for and on account of the respondent The Peoples National Bank of Denver.

47 United States of America,
State of Colorado—ss.

No. 4116.

In the Circuit Court of the United States, for the District of Colorado.

Earl M. Cranston, as Receiver of The People's National Bank of Denver, Colorado, a National banking association, Plaintiff,

vs. In Equity.

George C. Schleier and The People's National Bank of Denver, Colorado, a National banking association, Defendants.

The demurrer of the above named defendant, The People's National Bank of Denver, Colorado, a National Banking Association, to the bill of complaint of the above named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill of complaint to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for causes of demurrer showeth:

1. That the said plaintiff has not in and by the said bill made or stated any such cause as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

2. That the said bill doth not contain any matter of
48 equity wherein this court can ground any decree or give to the plaintiff any relief against this defendant.

3. That it appears in and by the said bill of complaint that more than eleven years have elapsed since the alleged cause of complaint in said bill set out accrued, and that the plaintiff and those whom he represents have each and all been guilty of such laches as to bar plaintiff and those whom he represents in a court of equity from obtaining any relief against this defendant.

4. That it appears in and by the said bill of complaint that the alleged cause of complaint therein set out is so stale, and that so long a time has elapsed since the matters and things complained of took place and that plaintiff has been guilty of such laches, that it would be contrary to equity and good conscience for this court to take cognizance thereof or to enforce any further or other answer thereto.

Wherefore, and for diverse other good causes of demurrer appearing in the said bill, this defendant doth demur thereto and humbly demand the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed in this behalf most wrongfully sustained.

G. C. BARTELS,
JAMES H. BLOOD,
R. D. THOMPSON,
Solicitors for the defendant, The People's National Bank of Denver.

49 We hereby certify that in our opinion, the foregoing demurrer is well founded in point of law.

G. C. BARTELS,
JAMES H. BLOOD,
R. D. THOMPSON,
Of counsel for defendant, The Peoples National Bank of Denver.

State (District) of Colorado,
County of Arapahoe—ss.

Gustave C. Bartels, being first duly sworn, makes solemn oath and says; that he is one of the attorneys of the defendant, The Peoples National Bank of Denver, Colorado, a National Banking Association, and that the foregoing demurrer is not filed for delay.

This affidavit is made by the said attorney because none of the officers of the said bank are now within the district or State of Colorado.

GUSTAVE C. BARTELS.

Subscribed and sworn to before me this 1st day of April, A. D. 1901.

My notarial commission expires January 20th, 1903.

[Seal]

EDITH L. HARRIS,
Notary Public.

Indorsed: No. 4116. In Equity. United States Circuit Court District of Colorado. Earl M. Cranston, as receiver &c., Plaintiff, vs. George C. Schleier et al., defendants. Demurrer of The Peoples National Bank of Denver, to Bill of Complaint. Filed Apr. 1, 1901. Robert Bailey, Clerk. G. C. Bar-
50 tels, J. H. Blood, and R. D. Thompson, Solicitors for The Peoples National Bank.

14th Day. Friday, May 24th, A. D. 1901.

Present: The Honorable Moses Hallett, District Judge, and The Honorable John A. Riner, District Judge of the District of Wyoming assigned to the District of Colorado, and other officers as noted on the seventh instant.

And before the Honorable Moses Hallett, District Judge, the following proceedings were had:

Earl M. Cranston as Receiver of The Peoples National Bank of Denver, Colorado,
4116 vs. In Chancery.
George C. Schleier and The Peoples National Bank of Denver, Colorado.

Bill to Set Aside a Lease and for an Accounting.

This cause coming on now to be heard, the complainant appearing by H. M. Orahood, Esquire, his solicitor, and the respondents appearing by R. D. Thompson, Esquire, their solicitor.

Whereupon on motion of the respondents, the complainant not opposing, it is ordered by the court that this cause be and the same is hereby continued to the next term of the court.

United States of America,
District of Colorado—ss.

In the Circuit Court of the United States for the Eighth Judicial Circuit in and for the District of Colorado.

51 Earl M. Cranston, as Receiver of The People's National Bank of Denver, Colorado, a national banking Association, Plaintiff,
No. 4116. vs. In Equity.
George C. Schleier and The Peoples National Bank of Denver, Colorado, a national banking association, Defendants.

To the Honorable Judges of the Circuit Court of the United States for the District of Colorado:

Edwin F. Brown, as the receiver of The People's National Bank of Denver, Colorado, a national banking association, as

successor to Earl M. Cranston, as the receiver of said The People's National Bank, by leave of court in that behalf first had and obtained, brings this his amendment of his bill of complaint against the said defendants George C. Schleier and The People's National Bank of Denver, Colorado, a national banking association.

And thereupon your orator complains and makes amendment of his said bill of complaint herein, as follows:

First. In lieu of paragraphs of said complaint numbered respectively "15" (fifteen) and "16" (sixteen), the following allegations, viz:

"15. That on or about the 19th day of July, A. D. 1893, the said defendant banking association, being unable to pay its depositors in the due course of business, in accordance
52 with the provisions of said National Bank Act in such case made and provided, the Honorable Comptroller of the Currency of the United States took possession thereof, under the said National Bank Act, and appointed one J. B. Lazear as the receiver thereof, and he, the said J. B. Lazear, as such receiver, remained in possession of said bank, and its assets and affairs, until on or about the 21st day of August, A. D. 1893, when, upon the agreement of said bank to make a voluntary assessment of twenty (20) per cent, to restore the impairment of its share capital, the said receiver was discharged, and the directors and officers of the said bank, and the said bank, were restored to, and at all times thereafter hereinafter alleged, until the appointment of this plaintiff, were in the possession, control, and management of its said business and affairs.

And your orator avers, upon his information and belief, and so charges the fact to be, that at all the times hereinafter mentioned, from and after the said 19th day of July, A. D. 1893, the said defendant banking association was, and still is, insolvent.

"16. That about the times last aforesaid, viz. on and about and subsequent to the taking of possession of the said bank by the Honorable Comptroller of the Currency of the United States as aforesaid, the assets, business and affairs of the said defendant National Bank were very much involved, mixed, and commingled with those of said The People's Savings Bank, with whom it was located, in doing banking business ,in
53 the same banking room in said Bank Building; and that such commingled, mixed, and involved condition of the assets, business, and affairs of said defendant National Bank and said The People's Savings Bank continued until finally settled on or about the 20th day of November, A. D. 1899, by

the rendition of a final judgment in favor of said Fermor J. Spencer, Esquire, as the assignee of said The People's Savings Bank, as hereinafter alleged."

Second. By adding and inserting in said bill of complaint herein, between paragraphs numbered "16" (sixteen) as amended hereby, and paragraph numbered "17" (seventeen), the following paragraphs:

"16a. That on or about the 29th day of June, A. D. 1895, the said The People's Savings Bank, by reason of the said mingled, mixed and involved condition of its assets, business and affairs with those of the said defendant National Bank, became further unable to proceed with the conduct of its savings banking business, and then and there made a general assignment of all its assets and estate to one Fermor J. Spencer, as assignee thereof, who was, and at all the times hereinafter mentioned still is, in the possession, control and management of the assets, business and affairs of said The People's Savings Bank, in the administration of the said assignment and said assigned estate.

"16b. That at all the times thereafter, from on or about the 29th day of June, A. D. 1895, when the said Spencer, as assignee, was appointed, and the said Savings Bank made the said assignment, until on or about the month of Novem-
54 ber, A. D. 1896, the said defendant National Bank admitted that it was the debtor of the said People's Savings Bank, and the said National Bank co-operated with the said Spencer, as assignee of said Savings Bank, in making a settlement and in adjusting the relations, business, assets and affairs of the said institutions; but about said last mentioned date, viz: on or about the month of November, A. D. 1896, the said defendant People's National Bank and its officers and directors commenced to deny, and at all times thereafter, until the rendition of said judgment, continued to deny, all further liability, of every name, nature, and description whatsoever, from it, the said defendant National Bank, to the estate of said Savings Bank and to the said Spencer, as assignee thereof.

"16c. That thereafter, and in the month of January, A. D. 1897, the said defendant National Bank commenced to take steps for placing the said defendant National Bank in course of voluntary liquidation and for a surrender of its charter; and thereafter and on or about the 27th day of April, A. D. 1897, the stockholders of said defendant National Bank, in alleged compliance and pursuance of the said National Bank Act, held a meeting and determined upon a voluntary liquidation of the said bank and a dissolution and surrender of its charter; and thereafter, in alleged pursuance of the provisions

of the National Bank Act in such case made and provided, published a notice of said defendant bank's intention to go into liquidation, and for the presentation of claims against
55 the said bank, the last day of which expired on or about the 27th of June, A. D. 1897.

16d. That on or about the 26th day of June, A. D. 1897, and prior to the expiration of the time for the presentation of claims, and when the said bank would, if all its debts have been paid, have been entitled to become dissolved and to have surrendered its charter the said defendant bank having failed, neglected and refused to make full settlement, adjustment of, and accounting for, a very large amount of the assets, property, and estate of the said Savings Bank, the said Fermor J. Spencer, as assignee of said People's Savings Bank, threatened to commence, and did, to the extent of serving a summons, commence an action against the said National Bank, and at the same time served notice of the said claims and demands of him, the said Spencer, as assignee of the said Savings Bank, against the said defendant National Bank, upon the Honorable Comptroller of the Currency of the United States; that thereupon, as a result of the action last aforesaid of the said Spencer, as assignee, the said defendant National Bank entered into an agreement with the said Spencer, as assignee, which was and is in words and figures as follows, to wit:

This agreement made and entered into this 2nd day of July, A. D. 1897, by and between Fermor J. Spencer, Assignee of the Peoples Savings Bank, party of the first part, and the Peoples National Bank of Denver, party of the second part:

Witnesseth: That whereas, certain contentions and disputes have arisen in regard to the relationship of the said two
56 banks, and whereas, the said party of the first part has commenced a suit against the said party of the second part by serving summons on the 26th day of June, 1897, for the purpose of effecting a settlement of said contentions and disputes; and

Whereas, it seems advisable to both parties thereto that further steps in said suit should not be taken before January 1st, 1898, to give time for better understanding of the matter;

Now, therefore, it is hereby agreed that the party of the first part shall refrain from taking any further steps in said suit until January 1st, 1898, without prejudice of any nature or character whatsoever by reason of such delay; and the said party of the second part, in consideration of the delay in filing said complaint in said suit, hereby agrees that it will take no further action of any kind or nature whatsoever to the prejudice

of the said party of the first part in the above named suit, or any further action whatsoever for the surrender of its charter as a national bank, or the disposal of its property to the prejudice of the said party of the first part.

In witness whereof, the said parties have hereunto set their hands the day and years first above written.

(Signed) F. J. SPENCER, Assignee,
The Peoples Savings Bank.
THE PEOPLES NATIONAL BANK,
By M. J. Lawrence, President.
By D. D. Muir, Vice-Pt.

Wherefore, your orator prays, as he has before prayed in his original bill of complaint, and forasmuch as he is without any adequate remedy at law in the premises, that the said defendant may be compelled to answer all and singular the premises in the bill of complaint herein contained, and
57 the amendments hereby made thereto, but not under oath, the answer under oath of the said defendants, and each of them, being hereby expressly waived.

2nd. Your orator, upon final hearing, further prays for a decree declaring and adjudging the said alleged pretended lease purporting to have been made between the said National Banking association The People's National Bank of Denver, Colorado, and said defendant George C. Schleier, dated on or about September 12th, A. D. 1889, and recorded on or about September 21st, A. D. 1889, in book 547 at page 1 and following pages of the records in the office of the clerk and recorder of said Arapahoe County, State of Colorado, and also the said alleged pretended instruments of writing bearing date on or about October 30th, A. D. 1897, and recorded the 8th day of November, A. D. 1897, in book 1211, at pages 98 and 100 thereof, in the office of the clerk and recorder of said Arapahoe County, purporting to cancel said alleged pretended lease and yield up and surrender the same and the premises thereby alleged to be leased, together with the said Bank Building thereon, to the said defendant Schleier and each of said instruments and transactions, were and are absolutely null and void for all purposes, and ultra vires of the acts of the Congress of the United States in respect to the powers of national banks to acquire, own, and hold real estate, or to be and become indebted in the exercise of corporate powers, and that no title or right, legal or equitable, ever was or could be acquired under the same, or
58 either thereof, by the said defendant Schleier to the said Bank Building and the appurtenances thereunto belonging, or any part thereof.

3rd. Your orator further prays for a full accounting in the premises.

4th. Your orator further prays for a decree declaring and adjudging that whatever shall be found to be due upon said accounting to the estate of said defendant national banking association and to this plaintiff, as the receiver thereof, shall be a first and prior lien and charge upon the said Bank Building and premises, viz: Upon the said lots numbered from one (1) to four (4) both inclusive, in said block numbered seventy-five (75) in the East Division of the City of Denver, and the said Bank Building and improvements thereof, and that the said charge and first lien be enforced by a sale of the said lands and Bank Building.

5th. Your orator prays for such other and further relief as to the court shall seem meet and proper, and for costs of suit.

JAMES H. BROWN,
H. M. ORAHOOD,
WATTERS and KENDALL,
CRANSTON, PITKIN, and MOORE,
Solicitors for complainant.

State of Colorado,
County of Arapahoe—ss.

H. M. Orahood, being first duly sworn, on his oath deposes and says: That he is one of the solicitors for the complainant in the above entitled suit; that he is familiar with the facts stated in the above and foregoing amendments to the
59 complaint herein, and makes this verification for the foregoing reasons; that he has read the foregoing amendments to the bill of complaint herein, and knows the contents thereof, and that the same are true of his own knowledge in substance and in fact, except as to those matters and things therein stated on information and belief, and as to those matters he believes it to be true.

H. M. ORAHOOD.

Subscribed and sworn to before me this thirty-first day of October, A. D. 1901. My notarial commission will expire Nov. 12th, 1904.

WILLIAM A. REEF, Notary Public.

Received copy of above this 31st day of October, A. D. 1901.
[Seal] R. D. THOMPSON, F. P. N.

Indorsed: No. 4116. In the Supreme Court of The United States for The District of Colorado. Earl M. Cranston as Receiver of The People's National Bank, plaintiff vs. George C. Schleier et al., defendant. Amendments to Complaint. Filed

Nov. 2, 1901. Robert Bailey, Clerk. James H. Brown and Andrew W. Gillette, Attorneys and Counsellors, Rooms 815 to 823 Cooper Building, Denver.

First Day, November Term Tuesday, November 5th, A. D. 1901.

Pleas in the United States Circuit Court for the District of Colorado, at a term thereof, begun and held at the
60 United States Court House at Denver on the first Tuesday (it being the fifth day) of November in the year of our Lord, one thousand nine hundred and one.

Present: The Honorable John A. Riner, District Judge of the District of Wyoming, assigned to the District of Colorado. Earl M. Cranston, Esquire, District Attorney. Dewey C. Bailey, Esquire, Marshal. Robert Bailey, Esquire, Clerk.

Earl M. Cranston, Receiver of the Peoples' National Bank, of Denver,

4116. vs. In Equity.

George C. Schleier and the Peoples National Bank of Denver.

Bill to Set Aside a Lease, for an Accounting, and Other Relief.

This cause coming on now to be heard, James H. Brown, Esquire, appearing as solicitor for the complainant, and R. D. Thompson, Esquire, appearing as solicitor for the respondents. And it appearing to the court that Earl M. Cranston has resigned his office of receiver of the People's National Bank of Denver, and that Edwin F. Brown has been duly appointed, and has qualified, and is now acting as receiver of the People's National Bank of Denver, on motion of complainant, and pursuant to a written stipulation thereto herein filed.

It is ordered, adjudged, and decreed by the court that Edwin F. Brown, receiver of The People's National Bank of Denver be and he is hereby substituted as complainant in this cause in the place and stead of Earl M. Cranston, receiver etc.

And it is further ordered by the court, on motion of complainant, and pursuant to a written stipulation thereto herein filed, that the complainant may file herein amendments to his bill of complaint instanter, and that the demurrer here-
61 tofore filed to the bill of complaint shall stand and be taken to be a demurrer to the bill of complaint as amended.

18th Day. Monday, December 2d, A. D. 1901.

Present: The Honorable Moses Hallett, District Judge, and the Honorable John A. Riner, District Judge of the District of Wyoming, assigned to the District of Colorado. And before the Honorable John A. Riner, District Judge of the District of Wyoming, assigned to the District of Colorado, the following proceeding was had.

Edwin F. Brown as Receiver, of the Peoples National Bank of Denver, Colorado.
4116. vs. In Chancery.
George C. Schleier and The Peoples National Bank of Denver, Colorado.

Bill to Set Aside a Lease and for an Accounting.

This cause coming on now to be heard upon the separate demurrers of the respondents to the bill of complaint herein, James H. Brown, Esquire, appearing as solicitor for the complainant and R. D. Thompson Esquire, appearing as solicitor for the respondent Schleier, and J. M. Waldron, Esquire, appearing as solicitor for the respondent The Peoples National Bank of Denver, and is argued by counsel to the hour of adjournment.

19th Day. Tuesday, December 3rd, A. D. 1901.

Present: The Honorable Moses Hallett, District Judge, and the Honorable John A. Riner, District Judge of the District of Wyoming assigned to the District of Colorado, and other officers as noted on the 5th day of November last past. And before the Honorable John A. Riner, District Judge of the district of Wyoming, assigned to the district of Colorado, the following proceeding was had:

62 Edwin F. Brown, as Receiver, etc.,
4116. vs. In Chancery.
George C. Schleier et al.

Bill to set Aside a Lease and for an Accounting.

This cause now coming on to be further heard upon the separate demurrers of the respondents to the bill of complaint herein, James H. Brown, Esquire, appearing as solicitor for the complainant, and R. D. Thompson, Esquire, appearing as solicitor for the respondent Schleier, and J. M. Waldron, Esquire, appearing as solicitor for the respondent The Peoples National Bank of Denver, and is argued by counsel to the hour of adjournment.

20th Day. Wednesday, December 4th, A. D. 1901.

Present: The Honorable Moses Hallett, District Judge, and the Honorable John A. Riner, District Judge of the District of Wyoming, assigned to the District of Colorado, and other officers as noted on the 5th day of November last past. And before the Honorable John A. Riner, District Judge of the District of Wyoming, assigned to the District of Colorado, the following proceedings were had:

Edwin F. Brown, Receiver, etc.,
4116. vs. In Chancery.
George C. Schleier et al.

Bill to Set Aside a Lease, and for an Accounting.

This cause coming on now to be further heard upon the separate demurrers of the respondents to the bill of complaint herein, James H. Brown, Esquire, appearing as solicitor for the complainant, and R. D. Thompson, Esquire, appearing as solicitor for the respondent Schleier, and John M. Waldron, Esquire, appearing as solicitor for the respondent The
63 Peoples National Bank, and is argued by counsel, and by the court taken under advisement.

38th Day. Monday, December 30th, A. D. 1901.

Present: The Honorable Moses Hallett, District Judge, and The Honorable John A. Riner, District Judge of the District of Wyoming, assigned to the District of Colorado.

And before the Honorable John A. Riner, District Judge of the District of Wyoming, assigned to the District of Colorado, the following proceedings were had:

Edwin F. Brown, Receiver, etc.,
4116. vs. In Chancery.
George C. Schleier et al.

Bill to Set Aside Lease and for an Accounting.

This cause came on to be heard at this term, upon the demurrers of defendants to the bill of complaint herein, and was argued by counsel, and thereupon, upon consideration thereof, it is now

Ordered, adjudged, and decree by the court that the bill of complaint herein be and the same is hereby dismissed at the complainant's cost.

64 United States of America,
District of Colorado—ss.

In the Circuit Court of the United States for the Eighth Judicial Circuit in and for the District of Colorado.

Edwin F. Brown, as Receiver of The People's National Bank of Denver, Colorado, a National Banking *Association*, Plaintiff,

No. 4116. vs. In Equity.

George C. Schleier, and The People's National Bank of Denver, Colorado, a National Banking Association, Defendants.

Motion for Leave to File Amended Bill of Complaint.

Now comes the said plaintiff, and moves this Honorable Court for an order permitting the filing of the amended bill of complaint tendered herewith in the above entitled cause, notwithstanding any order or decree heretofore made herein, sustaining the demurrer of the said defendants, and ordering plaintiff's complaint, as amended, to be finally dismissed, and as grounds therefor avers:

That heretofore, and in the month of December last past, the Honorable John A. Riner, United States District Judge of this Circuit in and for the District of Wyoming, having theretofore heard the argument of the said defendant's demurrer to plaintiff's complaint as amended, made an order sus-
65 taining said demurrer, and ordering the said plaintiff's complaint, as amended, to be finally dismissed, for the reasons stated in a memorandum opinion, a copy of which was filed in the clerk's office of this Honorable Court on December 30th, A. D. 1901.

That the said Judge, at the time of rendering said opinion and making said order, was sitting in this Honorable Court in this cause at the said city of Denver, in said district of Colorado, and that said plaintiff, who was then and there represented by one of his counsel, H. M. Orahood, Esquire, then and there immediately after the delivering of said opinion, at once asked for leave of this Honorable Court as on the part of said plaintiff, to amend his bill of complaint so as to overcome as far as possible, the points of fact in which it was by said opinion found to be defective so as to protect and enforce the rights of plaintiff in this cause, and also requested that the entry of final order or decree dismissing said plaintiff's said bill, be withheld until plaintiff's counsel could have an opportunity to obtain a copy of said opinion and prepare the amendments to his said complaint; but that, as the said Orahood remembers, the said Honorable Judge inquired whether the amendments were then ready, and stated that he

expected to leave Denver that same day; that this Honorable Court, and the Judge thereof, this plaintiff not then being able to secure a copy of said opinion so as to present said
66 amendments to his complaint herein, then and there refused to abstain from entering the order or decree finally dismissing said cause, and then and there refused to grant such permission, and then and there, over the objection and exception of this plaintiff and his said counsel, entered said final order and decree, dismissing this action, and before this plaintiff and his counsel could obtain a copy of the said opinion and prepare said amendments to his said bill, viz: on the afternoon of the same day, to-wit, December 30th, A. D. 1901, aforesaid, left the said city and district of Colorado for the city of Cheyenne, in the State of Wyoming, and since that time has not been within the said district of Colorado, or sitting in said court, until this present week, commencing January 27th last past, which was the first opportunity that this plaintiff has had to serve notice of and bring up his said application for leave to file his said amended bill of compaint herein.

That this action is one whereby plaintiff, as the receiver of said defendant, the said People's National Bank, seeks to enforce a judgment for over four hundred and seventy-five thousand dollars ($475,000), recovered against said defendant National Bank, in favor of Fermor J. Spencer, Esquire, as the assignee of The People's Savings Bank of Denver, Colorado, which said Savings Bank is indebted to a large number of depositors, who had large and small deposits therein on and long prior to its failure in June, A. D. 1895, as is averred in the plaintiff's original complaint as amended, and the
67 amended complaint herein, herewith tendered for filing; that the action is a very important one, not only with regard to the large amount involved, but the number of persons concerned and affected; that it is complicated and involves a large number of important questions of law and intricate details of fact. That plaintiff's counsel have in good faith at all times made their very best endeavors to present all the pertinent facts required to make a case without unnecessity prolixity, and that since the argument of the said demurrer, they are of the opinion—but without conceding the plaintiff's complaint herein, as amended, to be insufficient, notwithstanding the sustaining of the demurrer thereto—that abundant caution requires the setting forth of existing facts, the bearing of which upon the cause stated in the original complaint herein was not apparent, which facts put beyond question the sufficiency of the plaintiff's cause of action herein, by meeting the questions of fact argued on the hearing of defendant's demurrer herein, and pointed out in said opinion.

And this plaintiff and his said counsel expressly and specifically state that they are informed, and understand and believe, that the said Honorable Judge did not overrule the said application of plaintiff and enter the said final order of dismissal with any intention of either prejudicing or in any manner depriving this plaintiff of any opportunity to amend
68 his bill of complaint herein, but solely and only because the said Honorable Judge expected to at once leave the city, as he did leave the said city and state, and perhaps not return until after the expiration of this present term of court at which he made said order and handed down said opinion, and at which this application is made.

Plaintiff further avers that the said demurrer and the said opinion and order, and the argument had on said demurrer and the decision thereof, is the first argument upon the case of plaintiff made in his complaint herein, and that, as he is informed and believes the usual practice of this Honorable Court in this district, in cases of this magnitude and character, is to allow any amendment as to any material matters of fact which, as developed in the argument and decision of the first demurrer to the complaint, it is found have been inadvertently or otherwise omitted therefrom, or which are by the court ruled as necessary to be averred, and which can be averred, so as to satisfactorily, clearly, and conclusively present the issues in the cause of action between the parties.

Plaintiff further avers that by the demurrer interposed in this cause, which was sustained as aforesaid, there were only two grounds averred, viz: laches and want of equity, and that neither plaintiff nor any of his counsel had their attention called to the omission of the facts in respect to the existence of any claim or demand on the part of the People's Savings Bank or its depositors, as creditors directly or indi-
69 rectly, of said defendant The People's National Bank, whose liabilities were in existence on and prior to the execution of the said alleged pretended lease by the said defendant Schleier, and the other matter pointed out in the opinion herein, wherein the said plaintiff's complaint appears to be defective, until the said demurrer was argued before this Honorable Court.

Plaintiff further avers that he is suing here in a representative capacity, and was not and is not himself personally advised of all the facts and circumstances, but was and is dependent upon the obtaining of the information from others upon which to base said cause of action sought to be set forth in the complaint herein, and that until the handing down of the said opinion and the sustaining of the demurrer herein, he

was not fully cognizant of the said facts which are set forth in his amended bill of complaint tendered herein.

That unless this amended bill of complaint tendered herewith be permitted to be filed, he verily believes and fears that the said judgment of over four hundred and seventy-five thousand, eight hundred dollars ($475,800) in favor of Fermor J. Spencer, as assignee of said The People's Savings Bank, out of which, as herein and in the said amended bill averred, the several claims and demands of the depositors of said Savings Bank are made payable, can not be enforced, and that irreparable loss, damage, and injury will follow to the es-
70 tate of said People's Savings Bank and to its depositors and creditors, who comprise a large number of persons and a large amount of money.

That the said bill of complaint is amended in such respect as to meet the defects pointed out in the said opinion herein, as to the fact that the parties represented by this plaintiff were creditors of the said defendant National Bank at and long prior to the time of the making of the alleged pretended lease described in the bill, and that stockholders of the said defendant National Bank dissented and objected to the said alleged pretended surrender and conveyance of said defendant Bank's Bank building to said defendant Schleier at the time of and ever since the alleged conveyance thereof, and also in other matters, as will more fully appear by the said amended bill of complaint herewith tendered and made a part of this application.

And plaintiff further avers, that he is advised by his solicitors and counsel in this cause, that the said amended bill of complaint is proper and sufficient in law and equity to meet the defects pointed out by the said opinion, and, in their opinion, presents the same cause of action sought to be set forth in the bill of complaint as amended, of plaintiff herein aforesaid, and that unless this plaintiff be permitted to file his amended bill of complaint herein herewith tendered, great wrong and injustice will be done to a very large number of persons, consisting of mechanics, tradesmen, servants,
71 minors, and others, who were and are depositors and creditors of The People's Savings Bank of Denver, Colorado, whose assignee, Fermor J. Spencer, has a judgment for over four hundred and seventy-five thousand dollars ($475,000) against the said People's National Bank.

Wherefore, this plaintiff respectfully renews his prayer made in the opening of this motion.

H. M. ORAHOOD,
JAS. H. BROWN,
CRANSTON, PITKIN AND MOORE,
WATTERS AND KENDALL,
Solicitors for plaintiff.

State of Colorado,
County of Arapahoe—ss.

Harper M. Orahood, being duly sworn, deposes and says: That he is one of the solicitors and counsel for the said plaintiff in the above entitled cause; that he has heard read the above and foregoing motion and knows the contents thereof, and that the matters and facts therein set forth are true of his own knowledge, except as to those matters therein set forth upon information, opinion, and belief, and as to those matters, he verily believes it to be true.

HARPER M. ORAHOOD.

Subscribed and sworn to before me this 31st day of January, A. D. 1902.

My notarial commission will expire November 12, 1904.

[Seal] WILLIAM A. REEF, Notary Public.

72 Indorsed: No. 4116. In the Circuit Court of the United States for the District of Colorado. Edwin F. Brown, as Receiver etc., plaintiff vs. George C. Schleier et al, defendant. Motion for leave to file Amended Bill of Complaint. Filed Feb. 1, 1902, Robert Bailey, Clerk. James H. Brown, Attorney and Counselor, Rooms 815 to 823 Cooper Building, Denver.

United States of America,
District of Colorado—ss.

In the Circuit Court of the United States for the Eighth Judicial Circuit in and for the District of Colorado.

Edwin F. Brown, as Receiver of The Peoples National Bank of Denver, Colorado, a National Banking Association, Plaintiff,

No. 4116 vs. In Equity.

George C. Schleier and The Peoples National Bank of Denver, Colorado, a National Banking Association Defendants.

Amended Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of Colorado:

Edwin F. Brown, as the successor of Earl M. Cranston as the Receiver of The People's National Bank of Denver, Colorado,

a national banking association, as hereinafter alleged, and a citizen of the State of Illinois, brings this, his amended
73 bill, by leave of court first had and obtained, against said The People's National Bank of Denver, Colorado, a national banking association of the city of Denver, Colorado, a citizen of the State of Colorado, and against George C. Schleier, of the city of Denver, Colorado, a citizen of the State of Colorado.

And thereupon your orator complains and says:

1. That the matter and amount involved in this suit exceeds, exclusive of costs, the sum or value of two thousand dollars ($2000) and arises under the laws of the United States, and that this suit is instituted by direction of an officer of the United States, viz., the Honorable Comptroller of the Currency of the Treasury of the United States, and is also for the purpose of winding up the business and affairs of said The People's National Bank of Denver, a national banking association, established under the laws of and the National Bank Act of, the United States.

2. That on or about the 30th day of July, A. D. 1889, the Honorable Comptroller of the Currency of the Treasury of the United States, under and in pursuance of the statutes of the United States and an application made to him thereunder, by an organization certificate bearing date July 1, A. D. 1889, issued his certificate bearing date the 30th day of July, A. D. 1889, authorizing the existence and the commencement of the transaction of business by said defendant, The People's National Bank of Denver, Colorado; and on and after the
74 said date, as hereinafter alleged, there was, and still is existing the said defendant, The People's National Bank of Denver, Colorado, created, organized and existing under and in pursuance of the said Statutes of the United States, providing for the creation of and governing banks, known as and called the "National Bank Act," in pursuance of said articles of association executed under section 5154 of the Revised Statutes of the United States, approved June 22, A. D. 1874, and the subsequent acts of the Congress of the United States in addition to and amendatory thereof (all of which said acts will for convenience and brevity be hereinafter referred to as the "National Bank Act").

3. That in and by its said articles of association and the authority of the provisions of said National Bank Act, said defendant The People's National Bank of Denver, Colorado, was authorized and empowered, and the same did provide:

(a) That the corporate name and title of the said association should be "The People's National Bank of Denver."

(b) That the place where the banking house or office should be located, and its operations of discount and deposit carried on, and its general business conducted, should be in the city of Denver, in the county of Arapahoe aforesaid.

(c) That the capital stock of said association should be three hundred thousand dollars ($300,000), to be divided into shares of one hundred dollars ($100) each.

75 (d) That said association should continue for a period of twenty (20) years from the said date of the execution of its said organization certificate, viz: From July 1, A. D. 1899, unless sooner dissolved.

4. That at all the times hereinafter mentioned, on and after the said first day of July, A. D. 1889, said The People's National Bank of Denver, of the city of Denver, in the County of Arapahoe aforesaid, became and was a national banking association, and as such was authorized and empowered and possessed, under and in pursuance of said National Bank Act, of the following powers and rights:

(a) To have succession for the period of twenty (20) years from said first day of July, A. D. 1889, unless sooner dissolved.

(b) To have, and did have, a fully paid-up capital stock to the amount of three hundred thousand dollars ($300,000) of the par value of one hundred dollars ($100) per share; and,

(c) To transact its usual business as such national banking association at an office or banking house located in the city of Denver, in the county of Arapahoe, aforesaid.

5. That at all times thereafter, hereinafter mentioned, down to and including and for some time after the date of the execution of the alleged pretended contract of lease, entered into between said defendant National Bank and said defendant Schleier, hereinafter set forth at length, the said total aggregate amount of the entire share capital remained and continued unchanged, and during all said time, was for the same said amount of three hundred thousand dollars ($300,000) aforesaid.

76 6. That for the purpose of its said business as such national banking association, said defendant bank was also empowered to make contracts, to purchase, hold, and convey real estate for the following purposes and for no others:

(1st) Such as should be necessary for its, said association's, immediate accommodation in the transaction of its business.

(2nd) Such as should be mortgaged to it in good faith for debts previously contracted.

(3rd) Such as should be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

(4th) Such as it should purchase at sales under judgments, decrees or mortgages, to be held by such association, or should purchase to secure debts due to it; but should not hold possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years.

7. But it was, at all the times herein mentioned, provided by said the National Bank Act, that said defendant association should not at any time be indebted or in any way liable to an amount exceeding the amount of its said capital stock, viz: Said three hundred thousand dollars ($300,000) at such time actually paid in and remaining undiminished by losses or otherwise, except on account of discount of the nature following:

(1st) Notes of circulation.

(2d) Moneys deposited with or collected by said association.

(3d) Bills of exchange or drafts drawn against money actually on deposit to the credit of said association, or due thereto.

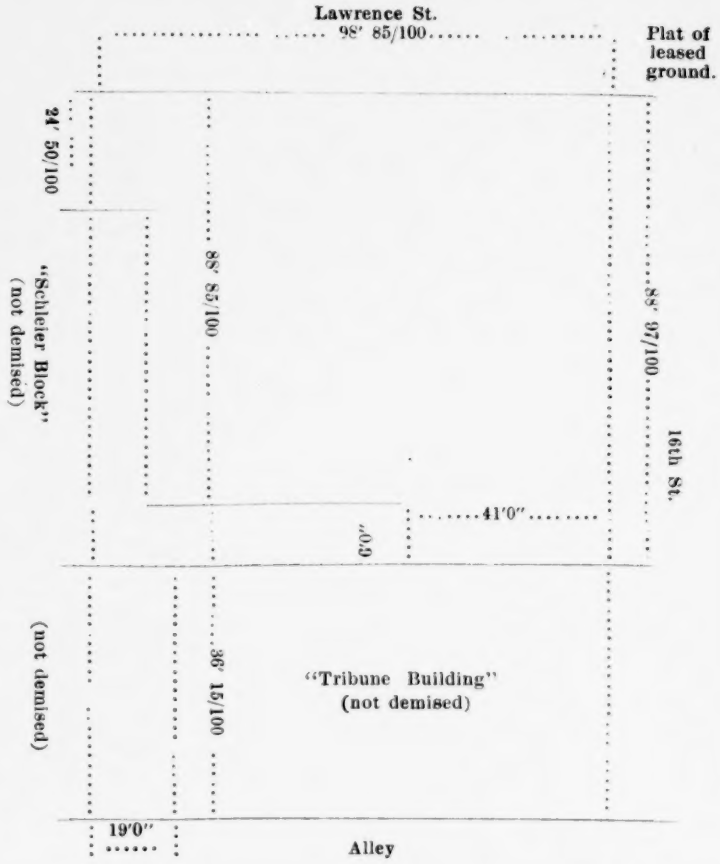
(4th) Liabilities to the stockholders of said associa-
77 tion, for dividends and reserve profits.

8. That it was also, at all the times herein mentioned, provided by said National Bank Act that said defendant "association or any member thereof, should not, during the time it shouldcontinue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends, or otherwise, any portion of its capital."

9. That at the time of the creation and organization of said national banking association, its banking house and office was located in a store room in a building situated on Arapahoe Street, between Sixteenth and Seventeenth Streets, in said city of Denver, for which it paid rent, and then and there, and at all times thereafter, except as hereinafter alleged, continued to carry on and conduct its said national banking business.

10. That thereafter and during the month of September, A. D. 1889 the said defendant, George C. Schleier, was the owner in fee simple, and in possession of lots numbered one (1), two (2), three (3), and four (4) all in block numbered seventy-five (75) in the East Division of the city of Denver, in the county of Arapahoe, aforesaid, which said property is located at the corner of Lawrence and Sixteenth Streets, in said city of Denver, at a distance of about a block and a half from the said place of business of the said national banking association, situated on Arapahoe Street, as aforesaid.

11. That during said month of September, 1889, and by an instrument in writing bearing date the 12th day of September, A. D. 1889, said national banking association, in violation of, and in contravention of the provisions and prohibitions
78 of said statutes of the United States comprising said National Bank Act and its said corporate powers, assumed to make and execute with the said defendant Schleier, an alleged pretended lease of the said real estate in said Block numbered seventy-five (75) which said pretended lease was recorded on September 21st, 1889, in book 547, at page 1 and the following pages of the records in the office of the Clerk and Recorder of said Arapahoe County, and was and is in words and figures as follows, to-wit:



79 This indenture, made this twelfth day of September, A. D. 1889, between George C. Schleier, of the County of Arapahoe and State of Colorado, as party of the first part, and "The Peoples National Bank of Denver," a banking corporation existing under and by virtue of the Acts of the Congress of the United States as party of the second part,

Witnesseth that the said party of the first part, for and in consideration of the rents, covenants, and agreements hereinafter reserved and contained, to be paid, kept and performed by the said party of the second part, its successors and assigns, has demised and leased to the said party of the second part, all those premises situate, lying, and being in the City of Denver in the County of Arapahoe and State of Colorado, known and described as follows, to wit: Commencing at the

most northerly corner of lot one (1) in block seventy-five (75) in the East Division of the city of Denver; thence southwesterly along Lawrence Street ninety-eight and eighty-five one hundredths (98.85) feet; thence along the northerly wall of the building known as the "Schleier Block," and of the office and boiler room addition thereto, upon the outside thereof, one hundred and twenty-five (125) feet to the alley in said block; thence northeasterly along the said alley nineteen (19) feet; thence at right angles in a northwesterly direction thirty-six and fifteen one hundredths (36.15) feet; thence in a northeasterly direction in a straight line to a point on the line of Sixteenth Street, which is eighty-eight and ninety-seven one hundredths (88.97) feet southeasterly from Lawrence Street; thence northwesterly along the line of Sixteenth Street eighty-eight and ninety-seven one hundredths (88-97) feet to the place of beginning, being parts of lots one (1) two (2), three (3), and four (4), in block seventy-five (75) aforesaid; Provided, however, that no part of the realty now occupied by either the so-called "Schleier Block" or the office and boiler room addition thereto, or the old "Tribune Building," is hereby demised or let.

To have and to hold the said above demised premises, unto the said party of the second part, its successors and as-
80 signs, for the term of ninety-nine (99) years from the first day of February, in the year of our Lord one thousand eight hundred and ninety, for and during and until the first day of February in the year of our Lord one thousand nine hundred and eighty-nine.

And the said party of the second part, in consideration of the leasing of the premises aforesaid, covenants and agrees for itself, its successors and assigns, with the said party of the first part, his heirs, personal representatives, and assigns, to pay to the said party of the first part, his heirs or assigns, as rent for the said demised premises the sum of thirteen thousand nine hundred and seventy-five ($13,975.00) dollars for each year during said term of ninety-nine years (99); said sum of thirteen thousand nine hundred and seventy-five ($13975.00) dollars to be paid in twelve equal instalments each year, the first instalment of eleven hundred sixty-four and fifty-eight hundredths ($1164.58) dollars to be paid on or before the fifteenth day of February, A. D. 1890, and then an instalment of eleven hundred sixty-four and fifty-eight hundredths ($1164.58) dollars on or before the fifteenth day of each and every month thereafter during said term.

The said party of the second part, its successors and assigns, in consideration of said letting as aforesaid, covenant and agree with the said party of the first part, his personal representatives heirs and assigns, that they will on or before the first

day of May, A. D. 1890, remove or cause to be removed, at their own cost and expense, the store rooms now situate upon said demised ground and that they will within eighteen months from February first, A. D. 1890, at their own cost and expense, build, erect, and complete a good substantial building, not less than four stories in height, to cost not less than one hundred thousand ($100,000) dollars and to face on both Sixteenth and Lawrence Streets provided that the party of the first part shall give, or cause possession of said premises to be given to the party of the second part on or before the said first day of February, A. D. 1890, and neither rent nor the other covenants of this lease shall be operative against said party of the second part until such possession is given; and provided further, that the time allowed herein for the removal of said store buildings now on said premises, and for the
81 erection of said building as aforesaid, shall be extended for the period of time said possession may be withheld from said party of the second part after February first, A. D. 1890. And it is further agreed and covenanted, that said building and improvements erected or made upon said premises shall at once become a part of the realty, that is to say, of the real estate hereinbefore demised, without any right on the part of any one whomsoever to remove the same or any part thereof, except for the purpose of remodeling, rebuilding, or improving the same.

And the said party of the second part, its successors and assigns, covenant and agree that they will, from time to time, and at all times during the continuance of this lease, keep any and all buildings and improvements which may be erected or made upon said demised premises in good order and repair at their own expense, and further, that, at the expiration of said ninety-nine (99) years, or fifty (50) years thereafter, if the same shall be extended as herein provided, they will peaceably and quietly leave, surrender, and yield up to the said party of the first part, his heirs and assigns the said demised premises, together with any and all buildings and improvements erected and made thereon.

And the said party of the second part, its successors and assigns, covenant and agree with said party of the first part, his heirs and assigns that they will, at their own expense, from time to time, and at all times during the continuance of this lease, insure and and all buildings and improvements to be erected on said premises from casualties by fire, for a sum not less than one-half of the then value of such buildings and improvements. And the said parties hereto agree, that in case of loss or damage by fire, if the same amount to one-fourth of the then value of said building or buildings or more, the said

insurance shall be paid to some trustee to be appointed by a court of competent jurisdiction, upon application of either of the parties hereto, to be held by him for the purpose of reinvesting and applying the same in and to repairing and replacing said building or buildings, and the policies issued for the insurance of said building or buildings shall contain a clause or provision that the moneys to be paid thereunder in case of loss or damages as aforesaid shall be paid and applied as
82 herein provided in case the loss or damage exceeds one-fourth of the value of said building or buildings, or more, as aforesaid. Should such sum, however, not be sufficient to repair or replace such building or improvements so damaged or destroyed, then and in that event the additional sum of money necessary to that end and for that purpose, shall be advanced and paid by the said party of the second part, its successors and assigns, and the building so damaged or destroyed by fire shall immediately and without any delay be restored and rebuilt by said party of the second part, its successors and assigns; provided, that in case of destruction of said building by fire, the cost of replacing the same need not be in excess of the value of the building destroyed at the time of its destruction.

And the said party of the second part, its successors and assigns, also covenant and agree with the said party of the first part, that they will on or before the first day of April, or before the property or any part thereof shall be advertised for sale, of each and every year during the existence of this lease, well and truly pay or cause to be paid, at their own cost and charges all rates, taxes, and assessments of whatsoever kind and nature, as shall or may from the first day of February, A. D. 1890, and during the term of ninety-nine (99) years hereby created, be lawfully imposed, levied on, charged or assessed upon and growing out of said demised premises. And if at any time after any such rate, tax or assessment, shall have become due or payable, the party of the second part, its successors or assigns shall neglect to pay such rate, tax or assessment it may be lawful for the party of the first part to pay the same at any time thereafter, and the amount of any and all such payments so made by the party of the first part shall be deemed and taken as, and is hereby declared to be so much further and additional rent for the above demised premises, to be immediately due from and payable by the said party of the second part, and the same may be collected as other rent, and in addition thereto whatever penalty or forfeiture is herein provided for the non-payment of rent, shall also exist and be available to the party of the first part, and operate against the party of the second part, its successors and assigns, for the non-payment of any such rate, tax, or assessment, as herein provided.

83 It is expressly understood, agreed, and convenated by and between the parties hereto, that if the rent above reserved, or any part thereof, shall be behind and remain unpaid for the period of fifteen days (15) after the same ought to be paid as aforesaid, or if default shall be made in any of the covenants or agreements herein contained, to be kept or performed by the said party of the second part, its successors or assigns, it shall and may be lawful for the party of the first part, his heirs, executors, administrators, agent, attorney or assign, at his or their election and the said party of the first part, his heirs, personal representatives or assigns shall have and are hereby given the right, power, and authority at any time after thirty days' notice (said notice to be served personally, if personal service can be had in the said city of Denver, but if such personal service can not be had, upon said party of the second part, its successors or assigns in said city of Denver, then said notice to be mailed at the said city of Denver to the last known place of residence of the said party of the second part, its successors or assigns, as the case may be), to sell and dispose of this lease, and all the right, title, benefit and equity which the party of the second part, its successors and assigns may have in and to the same, and in and to the said demised premises, together with all improvements thereon, at public auction, at the front door of the County Court House in the City of Denver, County of Arapahoe and State of Colorado, or at the said demised premises at one of the front doors thereof, for the highest and best price the same will bring in cash, thirty days public notice having been previously given of the time and place of such sale, by advertisement in one of the morning daily newspapers at that time published in said City of Denver, and to make, execute, and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for, or assignment of the said lease so sold, and of all the right, title, benefit, and equity of the said party of the second part, its successors and assigns thereunder and in said demised premises, and out of the proceeds or avails of such sale, and the purchase money paid thereon, after first paying all costs of advertising said sale, commissions and other
84 expenses, including all moneys advanced for taxes or other liens and assessments, and all rents due at the time of such sale, with interest thereon, to pay the overplus (if any) unto the said party of the second part, its successors and assigns, on reasonable request. And it shall not be obligatory upon the purchaser or purchasers at any such sale, or subsequent sale or sales, to see to the application of the purchase money, which sale or sales so made, shall be a perpet-

ual bar, both in law and equity, against the said party of the second part, its successors and assigns, and all other persons claiming the demised premises aforesaid, or any part thereof, by, from, through, or under said party of the second part, its successors or assigns or any of them, and either the first or second party hereto, their heirs, administrators, successors, or assigns, may become the purchaser of said lease, and of all the rights of the said party of the second part, its successors and assigns thereunder, and in said demised premises. And the said party of the second part, its successors and assigns, do hereby covenant and agree to surrender and deliver up the said above described premises and property peaceably, to the purchaser or purchasers of said lease, and of all the right, title, benefit and equity of the said party of the second part, its successors and assigns therein; and if the said party of the second part, or its legal representatives and assigns, shall remain in possession of the same thirty days after the termination of this lease, as before provided, or ten days after any sale of said lease and of the right, title, benefit, and equity of the said party of the second part, its successors and assigns therein as aforesaid, he or they shall be deemed guilty of a forcible and unlawful detainer of the premises, and shall be subject to all the conditions and provisions above named, and to eviction and removal, forcible or otherwise, with or without process of law, as above set forth.

It is further understood and agreed by and between the parties hereto, that the same rights and remedies available to the said party of the first part, his heirs, personal representatives and assigns, against the said party of the second part, its successors and assigns, under this lease shall exist and be available for default in the payment of any rent, rates, taxes, or assessments reserved and to be paid under this lease, or for the breach or violation of any other covenant, condition, or agreement herein contained and to be kept and performed by the said party of the second part, its successors and assigns, against purchasers at any sale or sales made under this lease, as hereinbefore provided, their heirs, successors and assigns; and further, that said remedy of sale in case of failure to pay the rents, rates, taxes, or assessments at the time and in the manner herein provided in this lease, or in case of a breach or violation of any other covenant, or agreement herein contained, to be kept or performed by the said party of the second part, its successors or assigns, shall exist whenever there may be a default in the payment of the rent, rates, taxes, or assessments as herein provided, or a breach or violation of any agreement, covenant, or condition herein contained, notwithstanding one or more sales may have been had

under the provisions hereof, said power of sale to be a continuing one until this lease shall have been terminated, but said remedy of sale shall not be construed as preventing the said party of the first part, his heirs, executors, administrators, agent, attorney, or assign from maintaining a personal action or actions to recover any rents becoming due hereunder or for moneys paid out on account of rates, taxes, or assessments on said demised premises.

It is further agreed and covenanted that any purchaser or purchasers of this lease, or of the right, title, and interest of said party of the second part, its successors and assigns, in said demised premises, at any sale or sales made hereunder as herein provided, their heirs, personal representatives, successors and assigns shall take and hold said lease and said demised premises subject to all the agreements covenants and conditions, and the same rent to be paid, kept, and performed by the said party of the second part, its successors and assigns, and that all rights and remedies herein reserved or available to said party of the first part, his heirs, personal representatives and assigns, shall and are hereby expressly reserved to said party of the first part, his heirs, legal representatives and assigns, against any purchaser or purchasers at the first sale made hereunder, and against any purchaser or purchasers at any such subsequent sale or sales, their heirs, personal repre-
86 sentatives, successors and assigns. For further indentification a plat of the realty demised herein is hereto attached and made a part hereof, said plat being drawn on a scale of sixteen feet to the inch.

The said party of the second part, for itself, its successors and assigns, covenants and agrees to and with the said party of the first part, his heirs personal representatives and assigns, that it will not erect or cause or permit to be erected any part of said building upon that portion of the said demised premises included within the red lines shown upon said plat above the level of the 16th street grade, and said party of the second part, its successors and assigns, further covenant and agree that that portion of the said demised premises included within the said red lines shall remain open and unobstructed for the purpose of light and air for the said building proposed to be erected by the said party of the second part, its successors or assigns, as well as for the buildings now situate upon and owned, and which may be erected hereafter, by the said party of the first part, his heirs and assigns, upon the parts of said lots one (1), two (2), three (3), and four (4), not hereby demised, and upon lots five (5) and six (6) all in said block seventy-five (75) in the East Division of said city, and that the said premises within the said red lines shall not be used for the purpose of

storage of personal property of any kind; said premises included within said red lines being described as follows, to-wit:

Commencing at a point on the outside line of the northeasterly wall of the said "Schleier Block" which is twenty-four (24) feet and six inches distant from Lawrence Street; thence in a southeasterly direction along the said outside line of said wall to a point which is eighty-five and eighty-five one hundredths (88.85) feet distant from said Lawrence Street; thence at right angles in a northeasterly direction to a point on the outside line of the wall of the said "Tribune Building", and which point is forty-one (41) feet distant from Sixteenth Street; thence at right angles parallel with Sixteenth Street and in a northeasterly direction six (6) feet; thence at right angles parallel with Lawrence Street in a southwesterly direc-
87 tion to a point six (6) feet from the outside line of said wall of said "Schleier Block," thence at right angles parallel with Sixteenth Street towards Lawrence Street, to a point which is twenty-four (24) feet and six (6) inches distant from said Lawrence Street; thence at right angles to the point of beginning.

It is further understood and agreed by and between the parties hereto, that that portion of said demised premises included within the blue lines, as shown upon said plat, may be excavated, and that portion thereof beneath the official grade shall be for the exclusive use of the said party of the second part, its successors and assigns, that on the northeasterly side of said strip, the said party of the second part will erect or cause to be erected, at its own cost and expense, a foundation wall such as will be put in elsewhere for the building to be erected upon said demised premises the stone pillars of which said wall below the surface or official grade, shall rest six inches upon said strip, and that said wall is to be the exclusive property of the said party of the first part, except as it serves as an inclosing wall for the excavation to be made, that said excavation is to be covered in a substantial way by flag-stone, or other equally substantial covering, and after so covered, said strip, except the portion under said cover is to be left open and used as a private way for the building to be erected as aforesaid, as well as for the buildings now owned by the said party of the first part, and the buildings which may be erected hereafter by the said party of the first part, his heirs and assigns, upon any portion of said lots one (1), two (2), three (3), four (4) five (5) and six not hereby demised said strip in this paragraph referred to being described as follows, to wit:

Commencing at a point where the outside line of the northeasterly wall of the office and boiler room addition to the said

"Schleier Block" intersects said alley; thence along said alley in a northeasterly direction nineteen (19) feet; thence at right angles parallel with Sixteenth street in a northwesterly direction thirty-six and fifteen one-hundredths (36.15) feet; thence at right angles in a southwesterly direction nineteen (19) feet; thence at right angles in a southeasterly direction thirty-six and fifteen one-hundredths (36.15) feet to the place of
88 beginning, being a strip of land nineteen (19) feet on said alley, by thirty-six and fifteen one hundredths (36.15) feet adjoining the office and boiler room addition to the said "Schleier Block."

It is further understood and agreed that no rights to any water from the artesian well located in the alley in said block seventy-five (75) shall pass hereunder.

The said party of the second part, its successors and assigns, further covenant and agree to and with the party of the first part that they will protect the walls of the so-called "Schleier Block" and of the office and boiler room addition thereto, and the walls of the "Tribune Building" adjoining the premises demised herein, and will save said party of the first part, his personal representatives, heirs, and assigns, harmless from any and all damage of whatsoever name and nature he or they may sustain by reason of any excavation for any building or improvements to be erected or made upon said demised premises.

The party of the first part further covenants and agrees, that the party of the second part, its successors and assigns, shall have the right to construct the footings for all foundation walls for its building beneath the foundation walls of the said "Schleier Block" and boiler room addition and the "Tribune Building" and to enter both of said buildings for the purpose of doing what may be necessary to properly support and maintain the walls and foundation of said block and buildings, provided the said party of the second part, its successors and assigns, shall do the same in a skillful and workmanlike manner, and said party of the second part, its successors and assigns, shall have said right and privilege without any additional cost or charge therefor.

It is further covenanted and agreed by and between all the parties hereto, that all the agreements, conditions and covenants in this lease shall be binding upon the heirs, personal representatives, successors and assigns of the respective parties hereto.

And the said party of the first part, for himself, his heirs, executors and administrators, covenants and agrees to and

with said party of the second part, its legal representatives, successors or assigns, that at the time of the ensealing
89 and delivery of these presents he is well seized of said premises in fee simple, and has good right, full power and lawful authority to let and demise the same in manner and form as aforesaid, and that the same are free and clear of all liens and encumbrances whatever.

It is expressly understood and agreed, that at the option of said party of the second part, its successors or assigns, the said party of the first part hereby agrees to extend this lease for a further term of fifty (50) years from the term of ninety-nine (99) years hereinbefore mentioned, at the same rent, and upon the same terms, conditions, agreements, and covenants herein contained:

Provided, however, that ninety (90) days' notice, prior to the expiration of said ninety-nine (99) years shall be given by the said party of the second part, its successors or assigns to the said party of the first part, his representatives, heirs, or assigns, of their intention to avail themselves of said option.

In testimony whereof, the said party of the first part has hereunto set his hand and seal, and the said party of the second part has caused these presents to be signed by its president, attested by its cashier thereunto duly authorized, and its corporate seal to be hereunto affixed, all in duplicate, the day and year first above written.

[Seal] GEORGE C. SCHLEIER,
THE PEOPLES NATIONAL
BANK OF DENVER,
By M. J. Lawrence, President.

Attest: C. Y. McClure, Cashier.
[Bank Seal]

The words, "above the level of the sixteenth street grade" and "the parts of" on page 11 and the words: "and boiler room addition" on page 14 were interlined in writing before execution.

GEORGE C. SCHLEIER,
M. J. LAWRENCE, Pt.

Attest: T. M. Patterson.
G. C. Bartels.
J. H. Blood.

90 State of Colorado,
County of Arapahoe—ss.

George C. Schleier appeared before me this fourteenth day of September, A. D. 1889, in person, and acknowledged the foregoing instrument to be his act and deed for the uses speci-

fied therein; and that M. J. Lawrence, as president, and Charles Y. McClure, as cashier, respectively, of The Peoples National Bank of Denver, appeared before me this fourteenth day of September, A. D. 1889, in person, and acknowledged the foregoing instrument to be the act and deed of The Peoples National Bank of Denver aforesaid, for the uses specified therein.

My commission expires May 18th, 1893.
Witness my hand and official seal.
[Seal] CARLOS WOOD,
Notary Public.

12. That acting under and by virtue of said alleged pretended lease, and in accordance with the provisions thereof, and not otherwise, the said national banking association took possession of said premises on or about the first day of February, A. D. 1890, and thereafter, in alleged pretended accordance with the provisions of said alleged pretended lease erected upon the premises therein described a large and commodious office and store building, occupying the whole of said premises, as stipulated by said alleged pretended lease.

13. That said building (which, for convenience and brevity in reference will be hereinafter styled the "Bank Building"), was built of brick, stone, steel, iron, and timber, and consisted of eight stories or floors above the cellar, and was constructed according to and was fitted with the latest modern im-
91 provements in building, such as gas and electricity, hot and cold water, two elevators, steam heating apparatus, and cost over the sum of the said capital stock of said defendant bank, that is to say, over the sum of three hundred thousand dollars ($300,000), viz. about the sum of three hundred and five thousand seven hundred and twenty-five and thirty-nine hundredths dollars ($305,725.39) all of which was done with the full knowledge, consent, and approval of said defendant Schleier.

14. That said bank building contained a large number of store and office rooms, viz: Six (6) store rooms on the ground floor, two (2) very large store or banking rooms, fitted with burglar-proof vaults, on the second or main floor, and about eighty-four (84) offices in the remaining stories thereof, and was built and adapted for being rented as a store and office building, as a real estate speculation, and was not confined to such a banking house or building as should be necessary for its the said defendant bank's immediate accommodation in the transaction of its business, and for no other purposes, as by the said National Bank Act, provided.

15. That thereafter, and on or about the month of January, A. D. 1891, the said bank building having been completed and prepared for occupation, said defendant national banking association moved its place of business into the said building, and thereafter, at all the times hereinafter mentioned, used and occupied one-half of the first or main floor for the transaction of its said banking business as well as the banking business of another corporation created and existing under the laws of the State of Colorado, known as and hereinafter called The People's Savings Bank; and thereafter rented, for pecuniary profit, and as a real estate speculation, the rest, residue, and remainder of the said building.

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16. That thereafter, at all the times hereinafter mentioned, the said defendant banking association continued in the ordinary conduct of its business as a national banking association and in the renting of the office rooms and stores in said building, conducting the same as a real estate speculation, until on or about the 19th day of July, A. D. 1893.

17. That on or about the 19th day of July, A. D. 1893, the said defendant banking association, being unable to pay its depositors in the due course of business, in accordance with the provisions of said National Bank Act, in such case made and provided, the Honorable Comptroller of the Currency of the United States took possession thereof, under the said National Bank Act, and appointed one J. B. Lazear as the Receiver thereof, and he, the said J. B. Lazear as such receiver, remained in possession of said bank and its assets and affairs until on or about the 21st day of August, A. D. 1893, when, upon the agreement of said bank to make a voluntary assessment of twenty (20) per cent. to restore the impairment of its share capital, the said receiver was discharged, and the directors and officers of the said bank, and the said bank, were restored to, and at all times thereafter hereinafter alleged, until the appointment of this plaintiff, were in the possession, control, and management of its said business and affairs; and your orator avers, upon his information and belief, and so charges the fact to be, that at all times hereinafter mentioned, on and after the said 19th day of July, A. D. 1893, the said defendant banking association was, and still is insolvent.

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18. That about the times last aforesaid, viz., on and about and subsequent to the taking of possession of the said bank by the Honorable Comptroller of the currency of the United States, as aforesaid, the assets, business, and affairs of the said defendant national bank were very much involved, mixed, and commingled with those of said The People's Savings Bank, with whom it was located, in doing banking business, in the

same banking room in said bank building; and that such commingled, mixed, and involved condition of the assets, business, and affairs of said defendant national bank and said The People's Savings Bank continued until finally settled on or about the 20th day of November, A. D. 1899, by the rendition of a final judgment in favor of said Fermor J. Spencer, Esquire, as the assignee of said The People's Savings Bank as hereinafter alleged.

19. That on or about the 29th day of June, A. D. 1895, the said The People's Savings Bank, by reason of the said mingled, mixed, and involved condition of its assets, business, and affairs with those of the said defendant National Bank, became further unable to proceed with the conduct of its savings
94 banking business, and then and there made a general assignment of all its assets and estate to one Fermor J. Spencer, as assignee thereof, who was and at all the times hereinafter mentioned still is in the possession, control, and management of the assets, business, and affairs of said The People's Savings Bank, in the administration of the said assignment and said assigned estate.

20. That at all the times thereafter, from on or about the 29th day of June, A. D. 1895, when the said Spencer as Assignee, was appointed, and the said savings bank made the said assignment, until on or about the month of November, A. D. 1896, the said defendant national bank admitted that it was the debtor of the said The People's Savings Bank, and the said national bank co-operated with the said Spencer, as Assignee of said savings bank, in making a settlement and in adjusting the relations, business, assets, and affairs of the said institutions; but about said last mentioned, date, viz: on or about the month of November, A. D. 1896, the said defendant People's National Bank and its officers and directors commenced to deny, and at all times thereafter, until the rendition of said judgment, continued to deny all further liability, of every name, nature, and description whatsoever, from it, the said defendant national bank, to the estate of said savings bank, and to the said Spencer as Assignee thereof.

21. That thereafter, and in the month of January, A. D. 1897, the said defendant national bank commenced to take steps for placing the said defendant national bank in
95 course of voluntary liquidation and for a surrender of its charter; and thereafter, and on or about the 27th day of April A. D. 1897, the stockholders of said defendant national bank, in alleged compliance and pursuance of the said National Bank Act, held a meeting and determined upon a vol-

untary liquidation of the said bank and a dissolution and surrender of its charter; and thereafter, in alleged pursuance of the provisions of the National Bank Act, in such case made and provided, published a notice of said defendant bank's intention to go into liquidation, and for the presentation of claims against the said bank, the last day of which expired on or about the 27th day of June, A. D. 1897.

22. That on or about the 26th day of June, A. D. 1897, and prior to the expiration of the time for the presentation of claims, and when the said bank would, if all its debts have been paid, have been entitled to become dissolved and to have surrendered its charter, the said defendant bank having failed, neglected, and refused to make full settlement, adjustment of, and accounting for a very large amount of the assets, property, and estate of the said savings bank, the said Fermor J. Spencer, as assignee of said The People's Savings Bank, threatened to commence, and did, to the extent of serving a summons, commence an action against the said national bank, and at the same time served notice of the said claims and
96 demands of him, the said Spencer, as Assignee of the said savings bank, against the said defendant national bank, upon the Honorable Comptroller of the currency of the United States; that thereupon, as a result of the action last aforesaid of the said Spencer as assignee the said defendant national bank entered into an agreement with the said Spencer, as assignee, which was and is in words and figures as follows, to wit:

This Agreement, made and entered into this 2d day of July, A. D. 1897, by and between Fermor J. Spencer, Assignee of The People's Savings Bank, party of the first part, and The People's National Bank of Denver, party of the second part.

Witnesseth, that whereas, certain contentions and disputes have arisen in regard to the relationship of the said two banks and whereas, the said party of the first part has commenced a suit against the said party of the second part by serving summons on the 26th day of June, 1897, for the purpose of effecting a setttlement of said contentions and disputes; and,

Whereas, it seems advisable to both parties thereto that further steps in said suit should not be taken before January 1, 1898, to give time for better understanding in the matter.

Now, Therefore, it is hereby agreed that the party of the first part shall refrain from taking any further steps in said suit until January 1, 1898, without prejudice of any nature of character whatsoever by reason of such delay; and the said party of the second part, in consideration of the delay in fil-

ing said complaint in said suit, hereby agrees that it will take no further action of any kind or nature whatsoever to the prejudice of the said party of the first part in the above named suit, or any further action whatsoever for the surrender
97 of its charter as a national bank, or the disposal of its property to the prejudice of the said party of the first part.

In Witness Whereof, the said parties have hereunto set their hands the day and year first above written.

(Signed) F. J. SPENCER, Assignee
The People's Savings Bank.
THE PEOPLE'S NATIONAL BANK,
By M. J. Lawrence, President,
By D. D. Muir, Vice-President.

23. That thereafter, and on or about the 20th day of September, A. D. 1897, said defendant national banking association, in furtherance of its determination to liquidate, dissolve, and wind up its affairs, issued a notice and called a special stockholders' meeting, of which the notice thereof was in words and figures as follows, to wit:

Stockholders' Meeting of The People's National Bank of Denver.

Notice is hereby given that a special meeting of the stockholders of The People's National Bank of Denver, Colorado, will be held at the banking room of said bank, on the 30th day of October, 1897, at 2 o'clock p. m., to consider a proposition to turn over the banking house of the said bank to George C. Schleier, the owner of the land on which the building is situated.

Owing to the fact that the income of the property is less than the fixed charges, it has become necessary to take some action to relieve the bank. It is important that all stockholders be present or duly represented. If you can not be present, please sign the enclosed proxy and return same to cashier at once.

If you have no other, the name of Biddle Reeves is suggested for proxy.

By order of the board of directors.
98 Denver, September 20, 1897.

M. J. LAWRENCE,
President.
J. H. CLEMES, Cashier.

And on the 28th day of September, A. D. 1897, said defendant National Banking Association, for the purposes aforesaid, issued another and further notice calling a special stockholder's meeting of which the notice therof was in words and figures as follows, to wit:

Stockholders' Meeting of The People's National Bank.

Notice is hereby given that a special meeting of the stockholders of the People's National Bank of Denver, Colo., will be held at the banking room of said bank on the 30th day of October, 1897, at 2 o'clock p. m. to consider the advisability of the present stockholders, with such other persons as may desire to do so, organizing a corporation under the laws of the State of Colorado to control the bank's assets, and to perform such other acts as may be contemplated in the certificate of incorporation of such new company.

A reorganization, such as contemplated, with a small capitalization, will be a great saving to the stockholders in reducing the amount of taxes now paid by the bank.

If you can not be present at the meeting in person, kindly sign the inclosed proxy to Mr. Biddle Reeves, and mail to the undersigned.

THE PEOPLE'S NATIONAL BANK,
By M. J. Lawrence, President.

Denver, Colo., September 28, 1897.

And on the day of December, A. D. 1897, said defendant National Banking Association, for the purposes aforesaid issued another and further notice, calling an annual stockholders' meeting, of which the notice thereof was in words and figures as follows, to wit:

99 Annual Stockholders' Meeting.

You are hereby notified that the annual meeting of the stockholders of the People's National Bank of Denver, Colorado, will be held in room 801, People's Bank Building, Denver, Colo., at 10 o'clock a. m. Tuesday, January 11, 1898.

At this meeting there will be an election of a board of directors for the ensuing year, and a proposition will then be submitted to wind up the business of the People's National Bank, and to make some suitable disposition of its assets; and such other business will be transacted as may be necessary or proper.

Please fill out enclosed proxy and mail to undersigned.

JAMES H. CLEMES, Cashier.

801 People's Bank Building, Denver, Colo.

24. And plaintiff further alleges that said banking house referred to in said stockholders' notice was the said banking house herein referred to in the allegations of this bill.

25. And plaintiff further alleges that for a long time prior to the giving of said stockholders' notice the said banking association and its officers and agents neglected the business of attending to the renting of the stores, offices, and rooms in said

Bank Building, and neglected to keep the same in good order and repair, and brought the same into disrepute and allowed it to run down, and allowed the rents thereof to remain uncollected and the taxes thereon to remain unpaid, and also diverted the moneys and income received from the renting of the offices, stores, and rooms in said Bank Building to other purposes than the payment of the rent and the taxes and charges, repairs and expenses of taking care of said
100 Bank Building, so that on or about the 30th day of October, A. D. 1897, there was due and owing to the said defendant George C. Schleier, as rent under said alleged pretended lease, for the months of August, September, and October, A. D. 1897, the sum of eleven hundred and sixty-four dollars and fifty-eight cents ($1164.58) due August 15th, 1897, the sum of eleven hundred and sixty-four dollars and fifty-eight cents ($1164.58) due September 15th, A. D. 1897, and the sum of eleven hundred and sixty-four dollars and fifty-eight cents ($1164.58) due the 15th day of October, A. D. 1897, and also the further sum of twenty-four hundred and eighteen dollars and five cents ($2418.05) due on account of the second half of the general taxes levied upon said premises for the year A. D. 1896, and also the sum of fifty-six dollars and forty cents ($56.40) due on account of an assessment made against said demised premises for the paving of the alley in the rear thereof, all of which said rents, taxes, and assessments the said defendant bank failed and neglected to pay, and permitted to remain unpaid.

26. Plaintiff further alleges that he is informed and believes and so charges the fact to be, that although it was and is represented in said notice calling said stockholders' meetings hereinbefore set forth, and also at the meeting of said stockholders, held in pursuance of said notices and by the officers of said defendant banking association, and by the attorneys and agents of said defendant Schleier, present at said
101 Stockholders' meetings, that the income of said property, meaning said bank building, was less than the fixed charges, in truth and in fact such was not the case, but that the rents and income from said property, in the neglected condition in which it then was, because of the misconduct and neglect of the said banking association and its officers and agents to care for and look after the renting of the same and the collection of the rents and its maintenance, were, as this plaintiff is informed and believes, and so charges the fact to be, sufficient to pay the rents and all charges due and required to be paid under the said alleged pretended lease, and to keep and maintain the said bank building in good order and repair.

27. Plaintiff further alleges, upon information and belief, and so charges the fact to be, that there were present at such

stockholders' meeting, a number of the shareholders of said defendant National Bank, who were opposed to and protested against, and voted against the conveyance, transfer, and surrender of said bank building and lease to said Schleier, and insisted that said defendant Schleier should exercise the remedies given him by said alleged pretended contract, instead of coercing and compelling a conveyance and surrender of said bank building; but their protests and objections were of no avail, and the stockholders at all times thereafter hereinafter mentioned, were, and still are, protesting and objecting against the said last mentioned transaction herein set forth, whereby the said bank building and lease were conveyed, transferred and surrendered to said defendant Schleier.

28. That this plaintiff is also informed and believes, and so charges the fact to be, that if the said defendant Schleier
102 had been willing to exercise the remedies given him by the said alleged pretended contract of lease, the interest of said defendant National Bank in said bank building and premises could have been sold and disposed of for an amount more than sufficient to pay all the then indebtedness owing to said defendant Schleier, and to have left a large amount to be applied by said defendant National Bank in payment of its other debts and liabilities; and that said defendant Schleier well knew that this could be done, but refused to permit the same to be done, and threatened to hold the said defendant bank and its stockholders personally liable for the balance of the then unexpired ninety-nine (99) year term of said alleged pretended lease, at the said rental therein named.

29. Your orator further complaining, alleges that said defendant banking association thereafter, and in violation of the statutes of the United States in such case made and provided, and contrary to the principles of equity governing the distribution and disposition of assets and payment of dividends on the dissolution of insolvent corporations, in consideration of being released from the obligation of paying such taxes and assessments under said alleged pretended lease upon said demised premises, and especially the said rent that had accrued for the said months of August, September, and October, A. D. 1897, and the second half of taxes for the year A. D. 1896, and that said alley assessment, and in virtue of the further consideration that he, the said Schleier, should release said bank and all its stockholders from any and all liability which might thereafter accrue against them or either of them under
103 and by virtue of the covenants and conditions of said alleged pretended lease, and in consideration of the said defendant Schleier accepting as rent for the said demised premises for the month of October, A. D. 1897, the rents ac-

cruing from the tenants of said bank in said building, less the expense of running said building for said month, did pretend, by instruments in writing, to bargain, sell, assign, transfer, convey, surrender and yield up unto the said defendant Schleier, his heirs and assigns, the said alleged pretended lease of the said demised premises therein described, including the improvements and the said bank building situate thereon and the term of years in said alleged pretended lease yet to come, and did cancel said alleged pretended lease, and did also, on or about said 30th day of October, A. D. 1897, surrender and deliver to the said Schleier the possession of the said premises, together with said bank building, and that ever since the 30th day of October, A. D. 1897 the said defendant Schleier has been and still is in the occupation and possession of the said premises, and said Bank Building, and claims to be the owner in fee simple thereof, free from any claim, right, title, or interest of any kind on the part of said defendant The People's National Bank of Denver, therein and thereto; that said instruments of writing purporting to make said surrender and cancellation of said lease and of the possession of said Bank Building, bore date October 30th, A. D. 1897, and were recorded on the 8th day of November, A. D. 1897, in book 1211, at pages 98 and 100 thereof, in the office of the Clerk and re-
104 corder of said Arapahoe County.

30. That said last mentioned instruments omitting only the notarial acknowledgments thereof, were and are in words and figures as follows: to-wit:

Release of Lease.

Peoples National Bank to George C. Schleier. Filed for record at 11:10 o'clock a. m., November 8th, 1897.

R. LeBERT, Recorder.

Whereas by lease or indenture dated September 12th, 1889, and recorded in book 547 commencing at page 1, of the records in the office of the clerk and recorder of Arapahoe County, State of Colorado, George C. Schleier demised and leased to the Peoples National Bank of Denver, those certain premises described in said lease, situate in the city of Denver, County of Arapahoe, and State of Colorado, and also described as follows, to-wit:

Commencing at the most northerly corner of lot one (1) in block seventy-five (75) in the east division of the city of Denver; thence southwesterly along Lawrence Street ninety-eight and eighty-five one hundredths (98.85) feet; thence along the northerly wall of the building known as The "Schleier Block" and the office and boiler room addition thereto, upon the outside thereof, one hundred and twenty-five (125) feet to the

alley in said block; thence northeasterly along the said alley nineteen (19) feet; thence at right angles in a northwesterly direction thirty-six and fifteen one hundredths (36.15) feet; thence in a northeasterly direction in a straight line to a point on the line of Sixteenth Street which is eighty-eight and ninety-seven one hundredths (88.97) feet southeasterly from Lawrence Street; thence northwesterly along the line of Sixteenth Street eighty-eight and ninety-seven one-hundredths (88.97) feet to the place of beginning; being part of lots one (1), two (2), three (3), four (4), in block seventy-five (75) upon which premises is now situate the building known as the Peoples Bank
105 Building.

Now, know all men by these presents: That the said The Peoples National Bank of Denver, doing business in the city of Denver and organized under the National banking laws of the United States, in consideration of the said George C. Schleier releasing the said bank and its stockholders from the payment of the August and September 1897 rent for said premises and from the payment of the second half of the 1896 taxes against the same and the alley paving assessment against the same and in the further consideration that the said George C. Schleier releases said bank and all of its stockholders from any and all liabilities which may hereafter accrue against them, or either of them under and by virtue of any of the covenants or conditions of said lease, and in the further consideration of the said George C. Schleier accepting as rent for the month of October, 1897, the rents accruing from the tenants in said building, less the expense of running the building for said month, has and hereby does bargain, sell, transfer, convey, surrender and yield up unto the said George C. Schleier, his heirs and assigns, said lease and said premises herein and hereinbefore described, including the improvements and the building situate thereon and the term of years in said lease yet to come.

And it is further covenanted and agreed that said lease is hereby cancelled.

In witness whereof, the said The Peoples National Bank of Denver has caused these presents to be signed in its name by Biddle Reeves, Chairman and Presiding Member, and J. H. Clemes, its Cashier, and its corporate seal to be hereunto affixed this 30th day of October, A. D. 1897.

THE PEOPLES NATIONAL BANK
(Corporate Seal) OF DENVER,
By Biddle Reeves,
Chairman and Presiding Member
and J. H. Clemes, its Cashier.

106 Release of Lease.

Peoples National Bank to George C. Schleier. Filed for record at 1:25 o'clock p. m., November 8, 1897.

R. LeBERT, Recorder.

Whereas by lease or indenture dated September 12, 1899, and recorded in book 547, commencing at page 1 of the records in the office of the Clerk and Recorder of Arapahoe County Colorado, George C. Schleier demised and leased to the People's National Bank of Denver, those certain premises described in said lease situate in the city of Denver, County of Arapahoe, and State of Colorado, and also described as follows, to-wit:

Commencing at the most northerly corner of lot one (1) in block seventy-five (75), in the East Division of the city of Denver, thence southwesterly along Lawrence Street ninety-eight and eighty-five one hundredths (98.85) feet; thence along the northerly wall of the building known as the "Schleier block", and of the office and boiler room addition thereto, upon the outside thereof, one hundred and twenty-five (125) feet to the alley in said block; thence northeasterly along the said alley nineteen feet; thence at right angles in a northwesterly direction thirty-six and fifteen one hundredths (36.15) feet; thence in a northeasterly direction in a straight line to a point on the line of Sixteenth Street, which is eighty-eight and ninety-seven one-hundredths (88.97) feet southeasterly from Lawrence street; thence northwesterly along the line of Sixteenth Street eighty-eight and ninety-seven one hundredths (88.97) feet to the place of beginning, being part of the lots one (1), two (2), three (3), four (4), in block seventy-five (75) upon which premises is now situate the building known as the People's Bank Building.

Now, know all men by these presents: That the said The People's National Bank of Denver, doing business in the city of Denver and organized under the national banking laws of the United States, in consideration of the said George C. Schleier releasing the said bank and its stockholders from the payment of the August and September, 1897, rent for said premises, and from the payment of the second half of the 1896 taxes against the same, and the alley paving assessment
107 against the same, and in the further consideration that the said George C. Schleier releases said bank and all of its stockholders from any and all liabilities which may hereafter accrue against them, or either of them, under and by virtue of any of the covenants and conditions of said lease, and in the further condition of the said George C. Schleier accepting as rent for the month of October, 1897, the rents accruing

from tenants in said building, less the expense of running the building for said month, has and hereby does bargain, sell, assign, transfer, convey, surrender, and yield up unto the said George C. Schleier, his heirs and assigns, said lease and said premises therein and hereinbefore described, including the improvements and the building situate thereon and the term of years in said lease yet to come.

And it is further covenanted and agreed, that said lease is hereby cancelled.

In witness whereof, the said The People's National Bank of Denver has caused these presents to be signed in its name by M. J. Lawrence, its president, and J. H. Clemes, its cashier, and its corporate seal to be hereunto affixed, this 30th day of October, A. D. 1897.

THE PEOPLE'S NATIONAL BANK OF DENVER,
By M. F. Lawrence, its president and
[Corporate Seal] J. H. Clemes, Its cashier

31. That on or about July 21, 1889, and at all times hereinafter mentioned, the People's Savings Bank was, and still is a savings bank corporation, created, organized and existing as a savings bank, under and in pursuance of the general statutes of the State of Colorado, providing for the creation and organization of all kinds of corporations, including the incorporation of savings banks.

(b) That during all the times last aforesaid, until on or about the 10th day of January, A. D. 1893, said Savings
108 Bank had a paid-up capital of the sum of fifty thousand dollars ($50,000) and thereafter at all times, a paid-up capital of the sum of about one hundred thousand dollars ($100,000).

32. That from on or about said July 21, 1889, until on or about the 29th day of June, 1895, when said Savings Bank made said general assignment to said Fermor J. Spencer, as assignee, as hereinbefore alleged, said Savings Bank was engaged at the said city of Denver, in carrying on and conducting the business of a savings bank, as authorized by its said charter under said general incorporation laws, and during the time last aforesaid, in so doing, it received on deposit all such sums of money as were from time to time offered it by tradesmen, mechanics, laborers, servants, minors, and others, for the purpose of safe keeping and being invested, which said deposits said Savings Bank was bound by its said charter and the law to repay with interest, to such depositors, or his or her lawful representative, whenever required by the depositor;

and in case of the insolvency of said bank, its said savings depositors were by the said charter and the general incorporation law, entitled to preference in payment over all other creditors and shareholders of said Savings Bank.

33. That during all the times last aforesaid, on, at, and after the time of the creation, organization and commencement of business by said defendant National Bank, down to on or about the 29th day of June, A. D. 1895, the time of said general assignment by said Savings Bank hereinbefore alleged, said Savings Bank had a very large number of depositors, made up of tradesmen, mechanics, laborers, servants, minors, and others, residing in and near the said city of Denver, the aggregate amount of whose deposits at the said date of August 1st, A. D. 1889, during the said month of August last aforesaid, was about two hundred thousand dollars ($200,000); that the aggregate amount of the deposits made by such depositors was thereafter rapidly increased from time to time, so that during the month of September, A. D. 1889, the said depositors had on deposit with said Savings Bank, the aggregate amount of about two hundred and thirteen thousand dollars ($213,000) which said aggregate amount of deposits by said depositors was thereafter increased from time to time until during the months of April and the fore part of May, A. D. 1893, said Savings Bank, had, of the moneys of the said depositors the aggregate sum of about one million two hundred and seventy thousand dollars ($1,270,000);

34. That long prior to the making and execution of said alleged pretended lease between the said defendant Schleier and the said defendant National Bank, hereinbefore set forth, and from the very first day of the legal existence of the said defendant National Bank and from the very first day of its commencement of business, viz: on or about the 1st day of August, 1889, and at all times thereafter herein mentioned, until on or about the 29th day of June, 1895, when said The People's Savings Bank made its said general assignment, as hereinbefore alleged, it, the said People's Savings Bank, was a depositor of its said deposits with said defendant The People's National Bank, and said defendant National Bank received the deposits and assets of said Savings Bank to a very large amount, viz: to nearly the full sum of each of the said several amounts of said Savings Bank's said deposits, hereinbefore alleged; that during all the times last aforesaid, the said defendant, The People's National Bank, was, and still is, liable to and indebted to it, said People's Savings Bank, and to its said Assignee, Fermor J. Spencer, for said Savings Bank's said deposits and assets; and that the said judgment hereinafter mentioned and set forth in favor of the said

Spencer, as Assignee of the said Savings Bank, against the said defendant National Bank, for the sum of four hundred and seventy-five thousand eight hundred and twenty-five dollars and seventy-one cents ($475,825.71) was and is the amount adjudged and decreed as due and owing, on and prior to the said 29th day of June, A. D. 1895, the date of said general assignment, from the said defendant National Bank to the said estate of the said People's Savings Bank, to be paid in the hands of said Spencer, as Assignee thereof, upon an accounting had between the said defendant National Bank and the said People's Savings Bank, and its said Assignee, said Spencer, for the said deposits and assets, of the said Savings Bank, so made with, and received by the said defendant National Bank.

35. That long prior to the making and execution of the said alleged pretended lease between the said defendant Schleier and said defendant National Bank, hereinbefore set forth, to wit, during the month of August, and up to, on and
111 before about the 14th day of September, A. D. 1889, the time of the execution of said pretended lease, there were a number of the said depositors of the said Savings Bank who, during the said times prior to the making and execution of the said alleged pretended lease, were depositors of their said moneys in said Savings Bank, and who at all times thereafter hereinafter mentioned, until on or about the 29th day of June, 1895, the day of the said general assignment of said Savings Bank to said Assignee Spencer, as hereinbefore alleged, were, and continued to be depositors of said Savings Bank and to whom the said The People's Savings Bank, during all the time last aforesaid, was liable to repay their said deposits and which said Savings Bank's depositors were, and still are, at the time of the commencement of this action, depositors and creditors of the said Savings Bank, and beneficiaries of its said assigned estate and of said judgment rendered in favor of said Fermor J. Spencer, as Assignee of said Savings Bank, against said defendant National Bank in its said suit wherein said judgment of four hundred and seventy-five thousand eight hundred and twenty-five dollars and seventy-one cents ($475,825.71) was rendered, as hereinbefore and hereinafter alleged.

36. That from the time of the original creation and organization of said defendant National Bank, viz: on or about August 1st, A. D. 1889, to on or about the fore part of the
112 year A. D. 1897, about when the said defendant bank decided to place said defendant National Bank in voluntary liquidation, and surrender its charter, as hereinbefore alleged, it the said defendant National Bank in compliance with the provisions of the said Act of [illegible] and the Na-

tional Bank Act, and especially with the provisions of No. 5211 of the U. S. Revised Statutes, did, under the oath of its officers and the attestation of its directors, from time to time, not less than about five times a year, make to the Honorable Comptroller of the Currency of the United States not less than about five several reports, according to the form prescribed by said Comptroller, exhibiting in detail and under proper heads, the resources and liabilities of said bank at the close of business on any business day by him, said Comptroller specified, each of which said reports was published in a newspaper published and circulated in the said city of Denver and vicinity, wherein said defendant National Bank and said The People's Savings Bank were established and engaged in carrying on and conducting their several corporate banking business.

37. That, according to the form prescribed by the said Comptroller of the Currency, said defendant National Bank was required, in each such report, under the head of "Resources," and under the item thereunder of "Banking House," to state and enter only such real estate, at its market value as near as possible, as was held by said defendant National Bank under said National Bank Act, and particularly under No.
113 5137 of the United States statutes, as was necessary for its, said defendant National Bank's immediate accommodation in the transaction of its business, and no other.

38. That said defendant National Bank and its officers and directors, in compliance with said statutory provisions of said National Bank Act, and with the requirements by said Comptroller, as to the form thereof, did, from time to time, make oath to, attest, and deliver to the Honorable Comptroller of the Currency, and from time to time did publish the same in a newspaper published and circulated in said city of Denver and vicinity, said several reports as to its resources and liabilities, wherein it was stated that at the conclusion of business of said defendant National Bank, on the hereinafter mentioned dates of each of said reports, the said banking house was a resource and an asset of said defendant National Bank to the market value of a very large amount, as follows, viz:—

That on the respective dates of the 20th of September and the 11th day of December, in the year A. D. 1889, and the 28th day of February, A. D. 1890, the banking house, furniture and fixtures, comprising resources of the said defendant National Bank, was of the market value of about five thousand eight hundred dollars ($5,800).

That on May 17th A. D. 1890, the said banking house, furniture and fixtures of said defendant National Bank were of the market value of fifty-nine thousand eight hundred and sixty-five dollars and seventy seven cents ($59,865.77).

114 That on July 18th, A. D. 1890, the said banking house, furniture and fixtures were of the market value of one hundred thirteen thousand eight hundred and eighty-four dollars and fifty-five cents ($113,884.55).

That on October 2nd, A. D. 1890, the said banking house, furniture and fixtures were of the market value of one hundred seventy-three thousand eight hundred and twenty-eight dollars and ninety-nine cents ($173,828.99).

That on December 19th, A. D. 1890, the said banking house, furniture, and fixtures were of the market value of two hundred fifty thousand six hundred and eighteen dollars and thirty cents ($250,618.30).

That on February 26th, A. D. 1891, the said banking house, furniture, and fixtures were of the market value of two hundred ninety thousand eight hundred and nineteen dollars and seventy-two cents ($290,819.72).

That on May 4th, A. D. 1891, the said banking house, furniture, and fixtures were of the market value of three hundred thousand three hundred and ninety-two dollars and eighty-three cents ($300,392.83).

That on July 9th A. D. 1891, the said banking house, furniture and fixtures were of the market value of three hundred six thousand nine hundred and forty-three dollars and thirty-eight cents ($306,943.38).

115 That on September 25th, A. D. 1891, the said banking house, furniture and fixtures were of the market value of three hundred five thousand one hundred and eight dollars and eighty-two cents ($305,108.82).

That on December 2nd, A. D. 1891, the said banking house, furniture and fixtures were of the market value of three hundred six thousand three hundred and seventy-seven dollars and thirty-one cents ($306,377.31).

That on March 1st A. D. 1892, the said banking house, furniture and fixtures were of the market value of three hundred ten thousand two hundred and forty-two dollars and six cents ($310,242.06).

That thereafter, in said reports made on May 17th, July 12th, September 30th and December 9th, all in the year A. D. 1892, and on March 6th, May 4th, July 12th, October 3rd, and December 19th, all in the year A. D. 1893, and on May 4th, July 186h, October 2nd, and December 9th, all in the year A. D. 1894, and on March 5th, May 7th, July 11th, September 28th, and December 13th, all in the year A. D. 1895, and on

February 28th, A. D. 1896, the said banking house, furniture and fixtures were of the market value of three hundred ten thousand dollars ($310,000).

39. That thereafter, in the said reports made on May 7th, July 14th, October 6th, and December 19th, all in the year A. D. 1896, and on March 10th, 1897, the said banking house, furniture, and fixtures were reported to be of the market value of one hundred and fifty thousand dollars (150,000); but complainant avers and charges the fact to be, that between
116 the said dates of February 28th, A. D. 1896, and May 7th, A. D. 1896, there was not an actual or any other such a depreciation, or any considerable depreciation, of value of the said bank building, furniture, and fixtures from the sum of three hundred and ten thousand dollars ($310,000) to the sum of one hundred and fifty thousand dollars ($150,000), but that the said market valuation of the said banking house, furniture and fixtures was arbitrarily changed either as the result of some order or direction from the said Comptroller of the Currency to the said defendant National Bank and its officers and directors, or by virtue of some understanding and agreement between said defendant National Bank and its officers and directors, either with or without the action of said comptroller.

And this plaintiff is informed and believes, and so charges the fact to be, that the several increases in the several market values of the said item of banking house, furniture, and fixtures, which as hereinbefore alleged, was reported at the close of business on the 28th day of February, A. D. 1890, to be of the market value of about five thousand eight hundred dollars ($5,800) to the market value of fifty-nine thousand eight hundred and sixty-five dollars and seventy cents ($59,865.70) at the conclusion of business on May 17th A. D. 1890, and to the market value of one hundred thirteen thousand eight hundred eighty-four dollars and fifty-five cents ($113,884.55) at the conclusion of business on July 18th, A. D. 1890, and
117 to the market value of one hundred seventy-three thousand eight hundred twenty-eight dollars and ninety-nine cents ($173,828.99) at the conclusion of business on October 2nd, A. D. 1890, and to the market value of two hundred fifty thousand six hundred and eighteen dollars and thirty cents ($250,618.30) at the conclusion of business on December 19th, A. D. 1890, and to the market value of two hundred ninety thousand eight hundred and nineteen dollars and seventy-two cents ($290,819.72) at the conclusion of business on February 26th, A. D. 1891, and to the market value of three hundred thousand three hundred and ninety-two dollars and eighty-three cents ($300,392.83) at the conclusion of business on May 4th, A. D. 1891, and to the market value of three hundred six

thousand nine hundred and forty-three dollars and thirty-eight cents ($306,943.38) at the conclusion of business on July 9th, A. D. 1891, and to the market value of three hundred ten thousand two hundred and forty-two dollars and six cents ($310,242.06) at the conclusion of business on March 1st, A. D. 1892, represent the several amounts and proportions of the expenditures from time to time made by the said defendant National Bank in the erection and construction of said banking house, as the same progressed to completion, as hereinbefore alleged, as constructed under and in pursuance of said pretended contract of lease between said defendant National Bank and said defendant Schleier.

41. And this plaintiff further avers that at no time and in no one of the said reports was there any other heading
118 or item whatsoever giving the slightest intimation or information that the said bank building was not a part and parcel of the resources, or was not an asset of the said defendant National Bank, or that said defendant Schleier had or claimed to have any right, title, or interest in and to said bank building, or any part thereof, nor was there at any time in any of said reports, any intimation or information stating that there was any expenditure, liability, or indebtedness by the said defendant National Bank, which would counterbalance, charge off, and overcome the existence of said bank building, as a part of the resources and an asset of the said defendant National Bank.

42. That during all the times last aforesaid, covered by the period of said reports and the existence of said defendant National Bank, on and prior to the 30th day of October, A. D. 1897, when the said bank building was conveyed, and the possession thereof surrendered by said defendant National Bank to defendant Schleier, the said items of furniture and fixtures so included in valuation with said banking house, under the item and title of "Banking house, furniture and fixtures", as aforesaid, contained and stated in each of said reports, was not by the said defendant National Bank and its officers and directors valued at a market value to exceed the sum of about five thousand eight hundred dollars ($5,800) and that said furniture and fixtures out of said item of "Banking House, furniture and fixtures", was not in truth or in fact, as this plaintiff
is informed and believes, and so charges the fact to be,
119 at any time during the times last aforesaid, of any further, greater, or other actual market value than the said sum of about five thousand eight hundred dollars ($5,800) and that the said rest, residue, and remainder of the said several amounts of the said several valuations so reported as the market values of said item of "Banking house, furniture, and

fixtures" in excess of said sum, viz: the said sum of about three hundred and five thousand dollars ($305,000) was and is the market value reported by said defendant National Bank and its officers and directors and intended to be by them reported, as the actual market value as near as possible, of the said banking house.

13. And this plaintiff further alleges that from on or about the 1st day of February, A. D. 1890, when the said defendant National Bank first entered into the possession of the said alleged demised premises, and at all the times thereafter hereinafter mentioned until the 30th day of October, A. D. 1897, when the said defendant National Bank conveyed the title to and surrendered the possession of the said bank building unto the said defendant Schleier as herein alleged, it, said defendant National Bank, was, and during all said time continued to be in [in] the open, notorious, exclusive, and undisputed possession and occupation of the said bank building and premises, and during all the times last aforesaid, claimed to be and held itself out to its depositors, creditors, the business public of said city of Denver, and its vicinity, and to the said government officials, as being the absolute owner and
120 proprietor of the said bank building, and during all said times, claimed, represented and reported to its depositors, creditors, the business public of said city of Denver and its vicinity, and the said government officials, that the said bank building was a part and parcel of the resources and an asset of the said defendant National Bank, of the market values aforesaid.

That said possession, occupation, and holding out of ownership, and such claim, representation and report of ownership and title to said bank building, and each thereof, was so made by said defendant National Bank for the purpose of maintaining, advancing and promoting the increase in the amount and number of its depositors, patrons, and customers in the conduct of its said banking business, and was so made with the intention that the same, and each thereof, should be acted upon and relied upon by its said depositors, creditors, the business public of said city of Denver and its vicinity, and the said government officials, as a representation by said defendant bank, and by its said officers and directors of its said ownership, resources, title, and assets aforesaid, to each one of said class of persons and officials, in business dealings with it, said defendant bank in carrying on and conducting its said banking business, including the continuation of old accounts, dealings, and business, as well as the opening of new accounts, new dealings, and new business.

44. That during all the times last aforesaid, viz: between on or about the first day of February, A. D. 1890, and
121 on or about the 30th day of October, A. D. 1897, the said defendant Schleier was not in the possession or occupation of the said bank building or said alleged demised premises, or any part thereof, and did not acquire or claim to have acquired, or to be entitled to the possession or ownership of any legal or equitable interest or estate in said bank building, or any part thereof, otherwise than as entitled to the receipt of rent from said defendant National Bank for the possession of said land occupied by said bank building, until he received said conveyances thereof, and the possession thereof from said defendant bank on or about the 30th day of October, 1897, as hereinbefore alleged; that if the said defendant Schleier, during any of the said time, had any possession or claim of possession, or ownership or claim of ownership, or any right, title, or interest, legal or equitable, to the said bank building, or any part thereof, otherwise, he, the said defendant Schleier, during all said times grossly and carelessly failed and neglected to give notice thereof, or bring any knowledge or notice thereof whatsoever to the attention of said Savings Bank or its said depositors or creditors, or the business public of the said city of Denver and its vicinity, or the said government officials who at any time dealt with said defendant National Bank, until after the said defendant Schleier had so received and secured said conveyances and said possession of said bank building.

45. That during all the times last aforesaid, the said
122 defendant Schleier knew that the said defendant National Bank was, during all said time, in the open, notorious, exclusive and undisputed possession and occupation of said bank building and premises, and was during all said time claiming to be the absolute owner and proprietor of said bank building, and was then and there during all said time, so claiming, representing and reporting to its depositors, creditors, the business public of the city of Denver and its vicinity and the said government officials, that the said bank building was a part and parcel of the resources, and an asset of said defendant National Bank, and also knew that such possession, occupation, and holding out of ownership and such claim, representation, and report of ownership of title to said bank building, and each thereof, was so made by said defendant bank for the purpose of maintaining, advancing, and promoting the increase in its banking business as aforesaid alleged, and was so made with the intention that the same and each thereof, should be acted upon and relied upon as aforesaid alleged; but that the said defendant Schleier, during all of said time

last aforesaid, grossly and carelessly failed and neglected to give notice of, or bring any knowledge or notice of any right, title, claim, or interest whatsoever, legal or equitable, on the part of him, the said defendant Schleier, in and to the said bank building to the attention of the said Savings Bank or its said depositors or creditors or the business public of the said city of Denver or its vicinity, or to said government
123 officials.

That during all the times last aforesaid, the said depositors of the said Savings Bank, and the said Savings Bank, and the said depositors and creditors of said National Bank were ignorant of any claim of right, title, or interest on the part of said defendant Schleier, in and to the said bank building, or any part thereof; but during all the times last aforesaid, relied and in good faith acted upon the truth of the said possession, occupation, claim of ownership, reports, and representations by said defendant National Bank, that it was the undisputed owner of the said bank building, as a part of its said resources, and an asset thereof, and in such reliance so dealt with and made deposits, and became and were during all the said times subsequent to the making of said alleged lease, and still are, creditors of said defendant National Bank.

46. Your orator further alleges that thereafter and on or about the 20th day of November, A. D. 1899, at the September term of the Honorable District Court, a court of record of the said state of Colorado, sitting in and for the County of Arapahoe, in said state, in a certain cause pending therein, commenced by the service of summons and copy of the complaint on or about June 26, A. D. 1897, one Fermor J. Spencer, Assignee of said People's Savings Bank, as plaintiff, and said National Banking Association as defendant, a judgment as aforesaid was rendered in favor of said plaintiff, and against
124 the said defendant for the sum of four hundred and seventy-five thousand eight hundredand twenty-fivedollars and seventy-one cents ($475,825.71); said plaintiff further alleges on information and belief, and so charges the fact to be, that said judgment has been paid only in part; that the pendency of said action wherein said judgment was rendered, was well known by said defendant Schleier, at the time of said alleged pretended surrender and cancellation of said alleged pretended lease of said premises.

47. That thereafter, by an instrument bearing date the 20th day of December, A. D. 1899, the Honorable Comptroller of the Currency of the United States having become satisfied of the insolvency of the said defendant National Banking Association, he did then and there, in pursuance of the said National

Bank Act, and on or about the 20th day of December, A. D. 1899, appoint said Earl M. Cranston, as Receiver of said defendant National Banking Association, The People's National Bank of Denver, Colo., and authorized and directed the closing up and winding up of all the business and affairs of said association.

48. That thereupon said Cranston duly qualified, and at all times thereafter hereinafter mentioned until about May 27th, A. D. 1901, was the receiver of said defendant National Banking Association, The People's National Bank of Denver, Colo.

49. That thereafter, viz: On or about the 27th day of October, A. D. 1900, and prior to the commencement of
125 this action, said The Honorable Comptroller of the Currency of the Treasury of the United States authorized, empowered and directed said Cranston as receiver as aforesaid, to commence and diligently prosecute this action, and this suit was commenced, and is prosecuted in accordance with the said order and direction of an officer of the United States, to wit, the said Comptroller of the Currency of the United States.

50. That thereafter and prior to on or about the 27th day of May, A. D. 1901, the said Earl M. Cranston resigned as receiver as aforesaid, and the Honorable Comptroller aforesaid, by commission of the date last aforesaid duly appointed as his successor the said plaintiff herein, Edwin F. Brown, who thereupon duly qualified and at all times thereafter hereinafter mentioned was and still is the receiver of said defendant National Banking Association, The Peoples National Bank of Denver, Colorado.

51. That thereafter, and by order of this Honorable Court made herein dated on or about November 5th, A. D. 1901, the said Edwin F. Brown, as receiver as aforesaid, was substituted as plaintiff in lieu of and in place of the said Earl M. Cranston, as receiver as aforesaid.

52. And plaintiff avers that he is ready and willing and hereby offers to do and perform whatever shall be deemed by this Honorable Court to be equitable and conscionable under all the circumstances, as may be decreed and ordered upon a final hearing of this suit.

126 53. Wherefore, the said plaintiff, your orator, prays, that forasmuch as he is without any adequate remedy at law in the premises, that the said defendants may be compelled to answer all and singular the premises in this amended bill of complaint contained, but not under oath, the answer of said defendants and each of them under oath being expressly hereby waived.

Second. And your orator further prays that a writ of subpoena may issue out of and under the seal of this Honorable Court, and directed to the said George C. Schleier and The People's National Bank of Denver, Colo., a national banking association, who are made defendants to this, your orator's amended bill of complaint, commanding him and the said corporation, by a certain day to be named, to appear before this court, and then and there answer the premises and abide the order and decree of the court.

Third. Your orator, upon final hearing, further prays for a decree declaring and adjudging the said alleged pretended lease purporting to have been made between the said national banking Association, The People's National Bank of Denver, Colo., and said defendant George C. Schleier, dated on or about September 12, 1889, and recorded on or about September 21, A. D. 1889, in book 547, at page 1, and following pages of the records in the office of the clerk and recorder of said Arapahoe County, State of Colorado, and also the said alleged pretended instruments of writing bearing date on or about Octo-
127 ber 30, A. D. 1897, and recorded the 8th day of November, A. D. 1897, in book 1211 at pages 98 and 100 thereof, in the office of the clerk and recorder of said Arapahoe County, purporting to cancel said alleged pretended lease and yield up and surrender the same and the premises thereby alleged to be leased, together with the said bank building thereon to the said defendant, Schleier, and each of said instruments and transactions were and are absolutely null and void for all purposes, and ultra vires of the acts of the Congress of the United States in respect to the powers of national banks to acquire, own, and hold real estate, or to be and become indebted in the exercise of corporate powers, and that no title or right, legal, or equitable, ever was, or could be acquired under the same or either thereof, by the said defendant Schleier to the said bank building, and the appurtenances thereunto belonging or any part thereof.

Fourth. Your orator further prays for a full accounting in the premises.

Fifth. Your orator further prays for a decree declaring and adjudging that whatever shall be found to be due upon said accounting to the estate of said defendant national banking association, and to this plaintiff as the receiver thereof, shall be a first and prior lien and charge upon the said bank building and premises, viz: Upon the said lots numbered from one (1) to four (4) both inclusive, in said block numbered
128 seventy-five (75) in the East Division of the City of Denver, and the said bank building and improvements thereon, and that said charge and first lien be enforced by a

sale of the said lands and bank building; and that said defendant Schleier be declared, adjudged, and decreed to be a trustee of the said property and accountable to the said plaintiff as receiver of the estate of said defendant national banking association for the amount and value of said property so found to be due upon an accounting to the estate of said defendant National Bank, and this plaintiff as Receiver thereof.

Sixth. Your orator prays for such other and further relief as to the court shall seem meet and proper, and for costs of suit.

JAMES H. BROWN,
WATTERS AND KENDALL,
Solicitors and of counsel for plaintiff.

United States of America,
District of Colorado,
County of Arapahoe—ss.

Harper M. Orahood, being first duly sworn, on his oath deposes and says: That he is one of the solicitors of counsel for the said plaintiff, Edwin F. Brown, as receiver in the above entitled suit; that the said plaintiff, Edwin F. Brown was, and is, a non-resident of, and absent from, the said State of Colorado, and is not so personally familiar with the facts as
129 is this affiant.

That affiant has assisted in the preparation of the foregoing amended bill of complaint, has heard the same read, and knows the contents thereof, and that the same is true, of affiant's own knowledge in substance and in fact, except as to the matters and things therein stated on information and belief, and as to those matters, affiant verily believes them to be true; that affiant makes this verification on behalf of the said plaintiff, Edwin F. Brown, as receiver, because of affiant's personal familiarity with the facts, and the want of such familiarity by the said plaintiff, and because of his absence from the said state.

HARPER M. ORAHOOD.

Subscribed and sworn to before me, this 30th day of January, A. D. 1902.

My Commission will expire Nov. 12, 1904.

[Seal] WILLIAM A. REEF,
Notary Public.

Indorsed: No. 4416, In Equity. United States of America, District of Colorado. In the Circuit Court of the United States for the Eighth Judicial Circuit. Edwin F. Brown, as Receiver of the People's National Bank of Denver, Colorado, a National Banking Association, plaintiff vs. George C. Schleier and The

People's National Bank of Denver, Colorado, a National Banking Association, defendants. Amended bill of Complaint. Tendered February 12, 1902. Robert Bailey, Clerk.

130 58th day. Saturday, February 1st, A. D., Clerk.

Present: The Honorable Moses Hallett, District Judge, and the Honorable John A. Riner, District Judge of the District of Wyoming, assigned to the District of Colorado, and other officers as noted on the 5th day of November last past.

And before The Honorable John A. Riner, District Judge of the District of Wyoming assigned to the District of Colorado, the following proceedings were had:

Edwin F. Brown, Receiver
4116 vs. In Chancery.
George C. Schleier et al.

Bill to Set Aside Lease and for an Accounting.

This cause came on to be heard at this term upon the motion filed by the complainant herein for leave to file an amended bill of complaint, and was argued by counsel.

Thereupon upon consideration thereof

It is now ordered, adjudged, and decreed by the court that the said motion for leave to file an amended bill of complaint be and the same is hereby overruled and denied.

67th day. Monday, February 24th, A. D. 1901.

Present: The Honorable Moses Hallett, District Judge, and other officers as noted on the 5th day of November last past.

Edwin F. Brown, as Receiver or the Peoples National Bank,
4116 vs. In Chancery.
George C. Schleier et al.

Bill to set aside a lease and for an Accounting.

131 This cause coming on now to be heard, James H. Brown, Esquire, appearing as solicitor for the complainant; and thereupon, on his motion,

It is ordered by the court that the following order stand and be taken to be of the same force and effect as though entered herein on the 19th instant, towit:

And now comes the complainant by his solicitor, and prays an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, which is allowed him, but upon the condition nevertheless, that the complainant give bond on such appeal in the sum of five hundred dollars ($500).

United States of America,
Eighth Judicial District—ss.

In the Circuit Court of Appeals of the United States in and for the Circuit Aforesaid.

Edwin F. Brown, as Receiver of The People's National Bank of Denver, Colorado, a National Banking Association, Appellant.

vs. In Equity.

George C. Schleier and The People's National Bank of Denver, Colorado, a National Banking Association, Appellees.

Assignment of Errors.

132 Now comes the said appellant and says that in the record and proceedings aforesaid in the above entitled cause, there is manifest error in this, to wit:

1. That the court erred in sustaining the several demurrers of the several appellees to the complaint of appellant, as amended.

2. That the court erred in not overruling the several demurrers of the several appellees to the complaint of appellant, as amended.

3. That the court abused its discretion and erred at the time immediately after handing down its opinion sustaining said demurrers of appellees herein, in refusing to give appellant time to secure a copy of said opinion, so as to prepare and present any proper amendment or amendments to his bill of complaint herein, discovered or decided by said opinion as proper to be made to establish the cause of action sought to be set forth in his complaint herein.

4. That, on sustaining said appellees' demurrers, the court abused its discretion and erred in denying appellant's request for time and for leave to amend his bill of complaint as amended, by immediately entering up final judgment, dismissing appellant's bill of complaint as amended, without giving time to appellant to secure a copy of said opinion, or to prepare and file proper or any amendments or the said amended bill of complaint.

5. That the court abused its discretion and erred
133 in denying plaintiff's request for leave to amend, when he tendered his amended bill of complaint herein.

6. That the court abused its discretion and erred in not permitting appellant to file his said amended bill of complaint herein.

Wherefore, appellant prays that the several orders and decrees sustaining the several demurrers of the said appellees to the bill of complaint of appellant as amended, and dismissing the said cause and denying the appellant the right to file his amended bill of complaint herein, may be reversed, annulled, and altogether holden for naught, and that he may be restored to all things which he hath lost by reason of the said several orders, decrees, and proceedings aforesaid.

H. M. ORAHOOD,
JAMES R BROWN,
Solicitors for appellant.

CRANSTON, PITKIN AND MOORE,
WATTERS AND KENDALL, of counsel.

Indorsed: 4116. In the Circuit Court of Appeals of the United States. Edwin F. Brown, Receiver of The People's National Bank of Denver, etc., Appellant vs. George C. Schleier et al., Appellees. Assignment of Errors. Filed Feb. 19, 1902. Robert Bailey, Clerk. Harper M. Orahood, James R. Brown et al., Solicitors for appellant.

(Bond on Appeal.)

The United States of America.
134 District of Colorado.

Know all Men by These Presents, That we, Edwin F. Brown as Receiver and Harper M. Orahood and Fermor J. Spencer as sureties The American Bonding and Trust Company of Baltimore City, are held and firmly bound unto George C. Schleier and The People's National Bank of Denver, Colorado, in the full and just sum of five hundred (500.00) dollars, to be paid to the said Schleier and Bank, their heirs, executors administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this seventeenth (17th) day of February, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at the November term, A. D. 1901, of the Circuit Court of the United States, for the District of Colorado, sitting at Denver, in a suit pending in said court between Edwin F. Brown as Receiver of said bank complainant, and said George C. Schleier and The People's National Bank of Denver, Colorado, respondents, judgment was rendered against the said complainant, and the said complainant having prayed, and been allowed, an appeal to the United States

Circuit Court of Appeals for the Eighth Circuit, to reverse the judgment of the said Circuit Court; and a Citation directed to the said respondents and each of them, citing and admonishing them to be and appear in the United States Circuit
135 Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now, the condition of the above obligation is such, that if the said complainant shall prosecute said appeal to effect, and answer all damages and costs, if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

FERMOR J. SPENCER. (Seal)
HARPER M. ORAHOOD, (Seal)
(Company Seal) The American Bonding and Trust Company of Baltimore City (Seal)
By RALPH W. SMITH,
Vice-President (Seal)
Attest: JUNE MOWER, Assistant Secretary.

Approved Feb'y 19th, 1902.
MOSES HALLETT,
Dist. Judge.

Indorsed: No. 4116. Circuit Court of the United States, District of Colorado. Edwin F. Brown, Receiver etc., vs. Geo. C. Schleier et al. Bond on Appeal. $500. Filed Feb. 19, 1902. Robert Bailey, Clerk.

136 Citation on Appeal.—U. S. Circuit Court of Appeals.

United States of America,
Eighth Judicial Circuit—ss.

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

The United States of America to George C. Schleier and The Peoples' National Bank of Denver, Colorado—Greeting:

You are hereby cited and admonished to be and appear in The United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal allowed filed in the Clerk's Office of the Circuit Court of the United States for the District of Colorado, sitting at Denver, wherein Edwin F. Brown, as Receiver of the Peoples' National Bank of Denver, Colorado, is appellant, and you are appellees, to show cause, if any there be, why the judgment

rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Moses Hallett, Judge of the Circuit Court of the United States for the District of Colorado, this 19th day of February, A. D. 1902.

MOSES HALLETT, Judge.

Proof of Service.

The United States of America,
District of Colorado—ss.

On this 25 day of Feby. A. D. 1902, personally appeared Melvin Edwards, Chief Office Deputy United States Marshal before me, the subscriber, Clerk of the [—] Court of the United States, for the District of Colorado, and makes oath that he delivered a true copy of the within citation to George C. Schleier and J. H. Clemes, Cashier of the Peoples Nat. Bank of Denver.

MELVIN EDWARDS,
Chief Office Deputy United States Marshal.

Seal United States Circuit Court District of Colorado.

Sworn to and subscribed before me, this 25th day of Feby. A. D. 1902.

ROBERT BAILEY, Clerk.

No. 4116. United States Circuit Court of Appeals, Eighth Circuit. Edwin F. Brown, Receiver, etc., vs. George C. Schleier et al. Citation. Filed Feb. 25, 1902. Robert Bailey, Clerk. James H. Brown, Attorney for Appellant.

137 United States of America,
District of Colorado—ss.

I, Robert Bailey, Clerk of the Circuit Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to one hundred and thirty-five (135), both inclusive, to be a true, perfect, and complete transcript and copy of the record and proceedings and of all thereof heretofore filed or entered of record in said court, and in a certain cause lately in said court pending, wherein Edwin F. Brown, Receiver of The Peoples National Bank of Denver was complainant and George C. Schleier and The Peoples National Bank of Denver were respondents, as fully and completely as the same still remain on file or of record in my office at Denver.

And I do further certify that I have annexed to and transmit herewith a copy of all opinions filed in said case.

Seal United States Circuit Court District of Colorado.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said District, this 26th day of February A. D. 1902.

ROBERT BAILEY, Clerk.

....., Deputy Clerk.

138 United States of America,
District of Colorado.

In the Circuit Court of the United States Eighth Judicial Circuit in and for the District of Colorado.

Edwin F. Brown, Receiver,
vs.
George C. Schleier et al.

Judge's Memorandum.

This is a bill in equity brought by the receiver of the People's National Bank of Denver against George C. Schleier and the bank, for the purpose of following certain moneys expended by the bank in the construction of the People's Bank Building, located on the corner of 16th and Lawrence streets.

The case is before the court upon demurrers filed by the defendants to the bill of complaint.

Statement of Facts.

The facts as disclosed by the bill may be briefly stated as follows: The defendant, the People's National Bank of Denver, Colorado, was incorporated on the first day of August, 1899, under the National Banking Act, with the usual powers of such corporations. The capital stock of the bank was three hundred thousand dollars. The bank was to do business in the city of Denver, and the period of its corporate existence under its charter, was twenty years.

139 In the month of September, 1889, the defendant George C. Schleier was the owner in fee simple, and in possession of lots numbered 1, 2, 3, and 4, in block 75, in the east division of the city of Denver. Said lots being at and near the corner of Lawrence and 16th streets. On the 12th of September, 1899, the defendant Bank entered into a lease with the defendant Schleier, for the lots above described for the period of ninety-nine years, from the first day of November, 1890, with an option to extend the lease for a further

period of fifty years, at an annual rental of $13,975, to be paid in twelve equal monthly instalments. In addition to the payment of rentals, the bank agreed to remove at its own cost and expense, the store rooms and buildings located on the ground, and within eighteen months from the first day of February, 1890, at its own cost and expense, to erect thereon a good substantial building, not less than four stories in height, and to cost not less than one hundred thousand dollars; said building to become at once a part of the realty. The bank further agreed to keep the building and improvements, erected on the land leased, in good order and repair at its own cost and expense. On the 21st day of September, 1899, the lease was duly recorded in the office of the county clerk and recorder of Arapahoe County, Colorado, in book No. 547, at page 1.

The bank entered into possession of the premises under the lease and thereafter removed the buildings then upon the ground, and proceeded with the construction of the new building described in the bill as the "Bank Building," at a cost of $305,725.39. The building contained, not only neces-
140 sary offices for the use of the bank, in conducting its banking business, but also, six store rooms and a number of office rooms, which the bank rented to parties not connected with it, either as stockholders or otherwise. The Bank Building was completed in January, 1891, and from that time on, until it ceased to do business, the bank occupied it. The bank continued to conduct therein its business as a National Banking Association, renting a portion of its main or first floor to a corporation, organized under the laws of the State of Colorado, and known as the "People's Savings Bank," and also renting the other offices and store rooms in said building, collecting the rents therefor.

On the 19th of July, 1893 the bank, being unable to pay its depositors in due course of business, it was, under and by virtue of the provisions of the National Banking Act, placed in the hands of the Comptroller of the Currency. One, J. B. Lozear, was appointed receiver thereof, and as such receiver took charge of the bank and its affairs from the 19th day of July, until the 21st of August, 1893. On that date, the bank having agreed to make a voluntary assessment of twenty per cent. to restore the impairment of its share capital the receiver was discharged and the directors and officers of the bank took charge and conducted the business until the appointment of the receiver herein. The bill alleges that the affairs of the defendant bank were very much involved, mixed, and com-
mingled with those of the People's Savings Bank, and
141 that by reason thereof, the Savings Bank was unable to proceed with its business, and on the 29th of June, 1895,

made a general assignment of all of its assets and estate to one Fermor J. Spencer who has, ever since, and still is in the possession, control, and management of the assets, business, and affairs of the Savings Bank, and that he, as such assignee, on the 20th day of November, 1899, procured a judgment against the defendant bank for the sum of $475,825.71 which remains unpaid.

It is alleged that in January, 1897, the defendant bank commenced to take steps looking to a voluntary liquidation and a surrender of its charter. That thereafter, and on or about the 27th day of April, 1897, the stockholders of the defendant Bank published a notice of the Bank's intention to go into liquidation and for the presentation of claims, fixing the 27th day of June, 1897, as the last day on which claims could be presented.

It is further alleged, that on the 26th day of June, 1897, Spencer, as assignee of the Savings Bank, threatened to commence and did, to the extent of serving the summons, commence an action against the defendant National Bank, and at the same time served notice of the claims and demands of the Savings Bank against the People's National Bank. That, thereafter, on the second of July, Spencer and the People's National Bank entered into a contract whereby it was agreed that Spencer should refrain from taking any further steps in that suit until the first of January, 1898, the same to be
142 without any prejudice to his rights and in consideration of the delay in filing the complaint in that suit, the defendant bank agreed that it would take no further action of any kind or nature to the prejudice of Spencer, as assignee, by the surrender of its charter or the disposal of its property.

It is further alleged that on the 26th of September, 1897, the defendant People's National Bank issued a notice and called a special meeting of its stockholders for the purpose of considering the proposition to turn over the banking house of the Bank to George C. Schleier, the owner of the land upon which the building was situated. And thereafter, the defendant Bank, in violation of the Statutes of the United States, in such case made and provided, and contrary to the principles of equity governing the distribution and disposition of assets in the payment of dividends on dissolution of insolvent corporations, in consideration of being released from the obligation of paying the taxes, assessments, and rents, then due under the lease, and of the release by Schleier, of the Bank and all its stockholders from any and all liability which might thereafter accrue against them, or either of them, under and by virtue of the covenants of the lease conveyed and surrendered the premises, covered by the lease, including the im-

provements thereon to Schleier, his heirs and assigns, that the lease was thereupon cancelled and Schleier entered into possession of the premises which he still holds.

143 Conclusions of the Court.

In disposing of the case presented by this record, it may be well to briefly consider, at the outset, just what relation the Receiver bears to this litigation. While I think it is undoubtedly true, as stated by Mr. Justice Miller in Case vs. Terrill, 11th Wallace, 202, that the receiver represents the Bank, its stockholders, its creditors, and does not in any sense represent the Government, yet it is not universally true that he holds the property subject to the same equities as the debtor held it. Many transactions would be binding upon the latter which would not be binding upon the receiver, thus all sales and securities made for the actual purpose of defrauding creditors are of this class. The receiver does not represent the bank alone. He represents all the parties in interest. In other words, he represents the law which takes charge of the property for the benefit of all of the creditors according to their respective mutual rights. He is appointed for the very purpose of securing equal justice to all creditors of the Bank and under a law which positively forbids preference. Such an officer, I think, (whatever may be the rule in case of voluntary assignments) may assert those rights of the general creditors, which the law itself creates, without being subject to all of the disabilities under which the bank would labor in combating its private engagements with favored creditors. In other words, I am inclined to the view that a receiver, under the National Banking Act, may well oppose any privi-

144 lege or preference which the law itself (unaided by a bona fide purchase or judgment) would regard as void against the general creditors in a direct contest between them and the parties claiming such preference, even though the bank, on account of some disability arising from its own acts or engagements, could not resist the claim. But in this case, the defendant Schleier is not charged with any fraud and it is not contended that the receiver represents either dissenting stockholders or creditors of the bank, who were creditors at the time of the execution of the lease. The bill is silent on this question and the court must assume that the bank had no creditors at the time the lease was made. The receiver then represents the creditors and the creditors only, whose rights accrued subsequent to the execution of the lease and the expenditure of the money used in the construction of the Bank Building.

I think it must be held, therefore, that they are in no better position to question the validity of the transaction com-

plained of than the bank itself. Could the bank avoid its obligations under the lease on the sole ground that in the execution of the lease and the construction of the building it had exceeded its charter powers and, therefore, that its acts were ultra vires? The answer to this question depends on whether there was an absolute want of power, or whether the acts complained of were merely an abuse of a power conferred. The general rule undoubtedly is that the powers of a corporation are such, and such only, as are conferred by the law under which it is incorporated.

145 The charter is the measure of the powers of every corporation, and this rule applies to National Banks as well as to other corporations, and is the test by which every corporate act is to be tried. It must be understood, however, that this rule necessarily concedes the usual proposition applicable to every legislative act, that is to say, that what is fairly implied is as much granted as if expressly enumerated. The National Banking Act expressly empowers a National Banking Association to purchase and hold real estate for certain specified purposes. Thus it may purchase and hold such real estate as may be necessary for its immediate accommodation in the transaction of its business, and this power unquestionably includes the right to take a lease for a term of years. It cannot be said, therefore, that there was an absolute want of power in the bank to take a lease for the purpose of securing to itself a banking house wherein to transact its business. The most that can be said is that in taking a lease for a term extending beyond its corporate franchise, it acted in excess of its powers. But this question can not be litigated in this suit. The bank is expressly authorized to acquire and hold title to real estate for certain purposes and to a certain amount, and the question, whether or not the particular real estate in controversy here, was acquired for the purposes authorized or in excess of the bank's powers can only be raised by the United States.

146 In National Bank vs. Mathews, 98th U. S. 628, it was held that even where a corporation is incompetent by its charter to take title to real estate, that a conveyance to it was not void, but only voidable and that the sovereign alone could object. "It is valid (said the court) until assailed in a direct proceeding instituted for that purpose." And in Silver Lake Bank vs. North (4 Johns. (N. Y.) Ch. 370) the bank was a Pennsylvania corporation and had taken a mortgage upon real estate in New York, and the defense to a bill to foreclose was, that by the act of incorporation plaintiffs were not authorized to take a mortgage, except to secure a debt previously contracted in the course of its dealings, and the money

in that case was lent after the bond and mortgage were executed. In disposing of the case, Chancellor Kent said: "Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the Government of Pennsylvania to exact a forfeiture of their charter, than for this court, in this collateral way, to decide a question of misuser by setting aside a just and bona fide contract.

The fact that the bank could not personally enjoy the interest granted by this lease, after the expiration of its franchise, would not have the effect to cut down the estate granted. The bank had the power of alienation and there is no reason why this lease could not be disposed of the same as real estate held in fee, or as any other asset of the bank. Express power is conferred upon the bank by the terms of the lease to
147 assign and transfer its interest in the leasehold estate. A lease is property and not a mere evidence of liability, and I can see no valid objection to the corporation making a lease which runs beyond the term of its corporate existence.

Even if it be admitted that the lease between the bank and the defendant Schleier, created an indebtedness in excess of its powers, as prescribed in the National Banking Act, yet I am inclined to the view that the lease must be held valid. The Statute does not in terms declare void the debt or liability so incurred. "The remedy" (said the court, in the case of Sioux City vs. Trust Company, 87th Federal, 124) "for the violation of this Statute is not the destruction of the contracts which evidence it, but the ouster and dissolution of the corporation at the suit of the State; the State alone can complain of it and the debtor cannot usurp its functions."

Neither do I think that the contention of counsel for the plaintiff, to the effect that the aggregate rent under the lease is to be considered as a liability or indebtedness of the bank, can be sustained. A covenant to pay rent creates no debt until it becomes due, and the liability incurred by the bank in this lease was merely a monthly liability to pay $1,164.58 monthly rent, which would cease upon the happening of one of several contingencies.

The lease in this case did not require the bank to build a three hundred and five thousand dollar building, neither does the complaint show that the bank, in constructing
148 the building, contracted a dollar of indebtedness, but even if the act of the bank in constructing so large a

building was ultra vires, Mr. Schleier could not have interfered with such construction, and I do not see upon what theory he can be held liable for its cost, or a lien declared upon the land in favor of the plaintiff. Lychfield vs. Ballou 114th U. S. 190.

The lease between the bank and Mr. Schleier was dated September 12th, 1899; the Bank Building was completed in January, 1891, and the building was used by the bank from that time until November, 1897, when it surrendered the building to Mr. Schleier and the lease was cancelled. These contracts have all been fully executed, and cannot now be set aside, even though they were ultra vires. In the case of Saint Louis, Vandalia, and Terre Haute Railroad Company vs. Terre Haute and Indianapolis Railroad Company, 145 U. S. 393, the court said: "When the parties are in pari delicto and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law, nor a court of equity, will assist the plaintiff to recover back the property conveyed, or money paid under the contract.

Within the rule announced in this case, Mr. Schleier, after he turned over his land to the bank and after he allowed the bank to construct its building thereon and remain in possession for seven years, could not come into court and
149 obtain possession of his property, or in any way repudiate the lease, even though the bank admitted that the lease was ultra vires. Neither could the bank (to whose rights, as we have already seen, the plaintiff succeeds), after it had surrendered the building constructed on the premises, leased, recover back, either the building or its value.

This proposition is, I think, conclusive of the case here. Many other interesting questions were raised and discussed at the hearing, and have all been carefully considered, but from the views already expressed, it becomes unnecessary to notice them separately. To do so would prolong this memorandum to an unwarranted length and no useful purpose would be subserved thereby.

Let a decree be entered dismissing the bill at complainant's costs.

Indorsed: 4116. Edwin F. Brown, Receiver, etc., vs. George C. Schleier et al. Memorandum Opinion, Riner D. J., on demurrer to bill. Filed Dec. 30, 1901. Robert Bailey, Clerk.

United States of America,
District of Colorado—ss.

I, Robert Bailey, Clerk of the Circuit Court of the United States for the District of Colorado, sitting at Denver, do hereby certify the above and foregoing pages numbered from one hundred and thirty-eight (138) to one hundred and forty-nine (149), both inclusive, to be a true, perfect, and complete
150 transcript and copy of all opinions heretofore handed down and filed in said court, and in a certain cause lately in said court pending, wherein Edwin F. Brown, Receiver of The People's National Bank of Denver, was complainant, and George C. Schleier, and The People's National Bank of Denver were respondents, as fully and completely as the same still remain on file in my office, at Denver.

In testimony to the above, I do hereunto sign my name and affix the seal of said Court, at Denver, in said District, this 26th day of February, A. D. 1902.

Seal
United States
Circuit Court
District of Colorado

ROBERT BAILEY, Clerk.

Filed Mar. 1, 1902. John D. Jordan, Clerk.

(*Appearance of Mr. James H. Brown for Appellant.*)

And on the second day of April, A. D. 1902, the appearance of Mr. James H. Brown, as counsel for appellant, was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following to wit:

United States Circuit Court of Appeals, Eighth Circuit.

EDWIN F. BROWN, Receiver, Appellant,
vs.
GEORGE C. SCHLEIER ET AL. } No. 1724.

The clerk will enter my appearance as counsel for the appellant.
JAMES H. BROWN.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1724. Edwin F. Brown, receiver, appellant, *vs.* George C. Schleier, *et al.* Appearance. Filed Apr. 2, 1902. John D. Jordan, clerk. James H. Brown, counsel for appellant.

(*Appearance of Mr. R. D. Thompson for Appellees.*)

And on the second day of April, A. D. 1902, the appearance of Mr. R. D. Thompson, as counsel for appellees, was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

EDWIN F. BROWN, Receiver, Appellant,
vs.
GEORGE C. SCHLEIER ET AL. } No. 1724.

The clerk will enter my appearance as counsel for the appellees.
R. D. THOMPSON.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1724. Edwin F. Brown, receiver, appellant, *vs.* George C. Schleier, *et al.* Appearance. Filed Apr. 2, 1902. John D. Jordan, clerk. R. D. Thompson, counsel for appellees.

(*Appearance of Messrs. H. M. Orahood and J. H. Brown for Appellant.*)

And on the third day of April, A. D. 1902, the appearance of Messrs. H. M. Orahood and J. H. Brown, as counsel for appellant, was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

EDWIN F. BROWN, Receiver, Appellant,
vs.
GEORGE C. SCHLEIER ET AL. } No. 1724.

The clerk will enter *my* appearance as counsel for the appellant.

H. M. ORAHOOD,
J. H. BROWN,
Denver, Colorado.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1724. Edwin F. Brown, receiver, appellant, *vs.* George C. Schleier, *et al.* Appearance. Filed Apr. 3, 1902. John D. Jordan, clerk. H. M. Orahood, Jas. H. Brown, counsel for appellant.

(*Appearance of Messrs. Bartels & Blood for Appellees.*)

And on the fourth day of April, A. D. 1902, the appearance of Messrs. Bartels & Blood, as counsel for appellees, was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

EDWIN F. BROWN, Receiver, Appellant,
vs.
GEORGE C. SCHLEIER ET AL. } No. 1724.

The clerk will enter *my* appearance as counsel for the appellees.

GUSTAVE C. BARTELS.
JAMES H. BLOOD.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1724. Edwin F. Brown, receiver, appellant, *vs.* George C. Schleier, *et al.* Appearance. Filed Apr. 4, 1902. John D. Jordan, clerk. Gustave C. Bartels and James H. Blood, counsel for appellees.

(*Appearance of Messrs. Cranston, Pitkin & Moore for Appellant.*)

And on the twenty-fifth day of April, A. D. 1902, the appearance of Messrs. Cranston, Pitkin & Moore, as counsel for appellant, was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

EDWIN F. BROWN, Receiver of the People's National Bank of Denver,
vs.
GEORGE C. SCHLEIER and THE PEOPLE'S NATIONAL BANK of Denver. } No. 1724.

The clerk will enter our appearance as counsel for the appellant.

EARL M. CRANSTON,
ROB'T J. PITKIN, &
WM. A. MOORE,
As Cranston, Pitkin & Moore.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1724. Edwin F. Brown, rec'r, etc., appellant, *vs.* George C. Schleier, *et al.* Appearance. Filed Apr. 25, 1902. John D. Jordan, clerk. Earl M. Cranston, Robert J. Pitkin, William A. Moore, counsel for appellant.

(*Order of Submission.*)

And on the fourth day of June, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1902.

WEDNESDAY, *June* 4, 1902.

EDWIN F. BROWN, as Receiver, &c., Appellant,
vs.
GEORGE C. SCHLEIER ET AL. } No. 1724.

Appeal from the circuit court of the United States for the district of Colorado.

This cause having been called for hearing in its regular order, argument was commenced by Mr. James H. Brown for appellant and concluded by Mr. R. D. Thompson for the appellees.

Thereupon, this cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the tenth day of November, A. D. 1902, an opinion of said circuit court of appeals was filed in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1902.

EDWIN F. BROWN, Receiver of the People's National Bank of Denver, Colorado, Appellant,
vs.
GEORGE C. SCHLEIER and THE PEOPLE'S NATIONAL BANK of Denver, Colorado, Appellees.

No. 1724. Appeal from the Circuit Court of the United States for the District of Colorado.

Mr. James H. Brown (Mr. H. M. Orahood, Mr. Earl M. Cranston, Mr. Robert J. Pitkin and Mr. William A. Moore were with him on the brief) for the appellant.

Mr. R. D. Thompson (Mr. G. C. Bartels and Mr. James H. Blood were with him on the brief) for the appellees.

Before Sanborn and Thayer, circuit judges, and Lochren, district judge.

This case passed off below on a demurrer to the bill of complaint which was once amended before the demurrer thereto was sustained. The case made by the bill of complaint as amended, is as follows: The People's National Bank of Denver, one of the appellees, was incorporated on July 30, 1889, under the national bank act for the period of twenty years from July 1, 1889, with a capital stock of $300,000 divided into shares of $100 each. On September 12, 1889, it leased a lot of ground in the city of Denver, having a front on Lawrence street of about 99 feet, from George C. Schleier, one of the appellees, for the term of 99 years from February 1, 1890, at a yearly rent of $13,975, which rent was to be paid in monthly installments of $1164.58 during each month of the term. The lessee, The People's National Bank, hereafter sometimes termed the bank, agreed to erect within eighteen months from and after February 1, 1890, at its own cost and expense, a substantial building not less than four stories in height, to cost not less than $100,000. By the terms of the lease the lessee was to have no right to remove the building but the same was to become a part of the realty. The lease also gave to the lessee and its assigns, an option to extend the lease for the same rental for a term of fifty years from and after the expiration of ninety-nine years. The bank took possession of the demised premises and on or about the month of January, 1891, had completed the erection of a building thereon, eight stories in height, at a cost of $305,725.39. On July 19, 1893, the bank became unable to pay its depositors in due course of business and the Comptroller of the Currency appointed J. B. Lazear as receiver thereof, pursuant to the provisions of the national bank act. Said Lazear remained in possession of its assets and affairs until August 21, 1893, when he was discharged, the bank having in the meantime levied an assessment of 20 per cent. upon its shareholders and thereby restored its capital so that it was deemed safe for it to resume business. At the date last mentioned the business and affairs of the bank had become some-

what involved and commingled with the business of another bank known as the People's savings bank, which latter bank was located and did business in the bank building that had been erected by the People's national bank, in which the latter bank also transacted its business. The People's savings bank having become embarrassed, subsequently made an assignment to Fermor J. Spencer, assignee, who thereafter, on June 26, 1897, brought an action against the People's national bank, in which action he recovered a judgment against it in the sum of $475,825.71 on November 30, 1899. About the month of January, 1897, the People's national bank commenced to liquidate its affairs with a view of surrendering its charter and on April 27, 1897, its stockholders at a meeting duly held for that purpose, resolved to go into voluntary liquidation. On September 20, 1897, the bank called a meeting of its stockholders to consider a proposition to surrender the remainder of its leasehold term to Schleier, the lessor, stating in its notice to the stockholders that as the income from the property which it had leased was less than the fixed charges, it had become necessary to take some action to relieve the bank. At that time there was due for rent in arrear under the lease, and for taxes which the lessee was obliged to pay, a sum amounting altogether to about $6000. In compliance with action which appears to have been taken at said stockholders' meeting, the bank subsequently, on October 30, 1897, surrendered its leasehold term to the lessor and the lessor agreed, in consideration of such surrender, to discharge the bank from its liability to pay such rents and taxes as were then in arrears; also to discharge the bank from all further installments of rent which were to accrue under the lease. Some time after the bank had resolved to go into voluntary liquidation, to wit: on December 20, 1899, Earl M. Cranston was appointed receiver of the People's national bank for the purpose of winding up its affairs. He continued to serve as receiver until May 27, 1901, when he resigned his office and Edwin F. Brown, the present receiver and appellant, was duly appointed in his place and stead by the Comptroller of the Currency.

In view of the premises the complainant prayed that the court would decree that the lease executed by Schleier to the bank on September 12, 1889, was null and void, in view of the national bank act; that the agreement purporting to cancel and surrender said pretended lease was also null and void; that there might be a full accounting between Schleier and the receiver, and that whatever was found due to the receiver, upon said accounting, be declared a first and prior lien upon the bank building which the bank had erected, as well as upon the ground upon which it was situated. The bill was demurred to for want of equity and the demurrer was sustained, whereupon a decree was entered dismissing the complaint. To reverse such decree an appeal has been prosecuted to this court.

THAYER, circuit judge, after stating the case as above, delivered the opinion of the court.

The bill in this case appears to have been exhibited, and a recovery is sought, upon the theory that the lease of September 12, 1889, was executed by the People's national bank in excess of its corporate powers and was therefore void; that Schleier, the lessor, was a party to the act whereby the charter of the bank was violated and is therefore liable as a joint tort-feasor for all the damage which the creditors of the bank have sustained in consequence of the execution of the lease without lawful authority. It is urged, in substance, that the lease was *ultra vires* the bank because it undertook, in violation of section 5137 of the Revised Statutes, to erect a building on the demised premises which it did not contemplate using "for its immediate accommodation in the transaction of its business" but did intend to rent in part to third parties. It is also claimed that the bank exceeded its powers in making the lease because it contracted an indebtedness to an amount exceeding its capital stock, in violation of section 5202 of the Revised Statutes, by engaging to pay rent at the rate of $13,975 per annum for the term of ninety-nine years; and incidentally it is claimed that the power conferred upon national banks by section 5137 of the Revised Statutes, to *purchase* and hold such real estate "as shall be necessary for its immediate accommodation in the transaction of its business," does not comprehend the power to *lease* property with a view of erecting a building thereon for its accommodation in the transaction of its business, nor the right to lease property for a longer period than it is to exist as a corporation.

We entertain no doubt that the power conferred on national banks by section 5137 of the Revised Statutes to purchase such real estate as is needed for their accommodation in the transaction of their business, includes the power to lease property whereon to erect buildings suitable to their wants. The power to purchase land is larger than the power to lease by as much as a fee-simple estate is larger than a term for years and the greater power includes the less. In the larger towns and cities of the United States, national banks usually find it necessary to locate themselves in the business centers where property is most in demand and likewise most valuable. In the large cities it will doubtless sometimes happen that a bank cannot locate itself in a quarter where its business interests demand that it should be located, unless it leases property for a term of years and agrees with the owner to erect a building thereon suitable to its wants. That a national bank may purchase a lot of land and erect such a building thereon as it needs for the accommodation of its business, admits of no controversy under the language of the statute and we perceive no reason why it may not likewise lease property for a term of years and agree with the lessor to construct such a building as it desires, provided, always, that it acts in good faith solely with a view of obtaining an eligible location and not with a view of investing its funds in real property or embarking them in speculations in real estate. Nor do we perceive any reason why a national bank, when it purchases or leases property for the erection

of a banking-house, should be compelled to use it exclusively for banking purposes. If the land which it purchases or leases for the accommodation of its business is very valuable, it should be accorded the same rights that belong to other land-owners of improving it in a way that will yield the largest income, lessen its own rent, and render that part of its funds which are invested in realty most productive. There is nothing, we think, in the national bank act, when rightly construed, which precludes national banks, so long as they act in good faith, from pursuing the policy above outlined. The act was framed with a view of preventing such associations from investing their funds in real property except when it becomes necessary to do so, either for the purpose of securing an eligible business location, or to secure debts previously contracted, or to prevent a loss at execution sales under judgments or decrees that have been rendered in their favor. When an occasion arises for an investment in real property for either of the purposes specified in the statute, the national bank act permits banking associations to act as any prudent person would act in making an investment in real estate and to exercise the same measure of judgment and discretion. The act ought not to be construed in such a way as to compel a national bank, when it acquires real property for a legitimate purpose, to deal with it otherwise than a prudent landowner would ordinarily deal with such property.

We think that the lease in question was not invalid because it created a term that would outlast the life of the corporation in whose favor it was created. If a corporation is empowered to acquire real estate by purchase or lease for the transaction of its business, it matters not that it acquires an estate or interest which will not expire until after the death of the corporation, provided the estate or interest so acquired is vendible. *Detroit Citizens' Street Railway Co. v. City of Detroit*, 12 C. C. A. 365, 64 Fed. Rep. 628; *Nicoll v. New York & Erie R. R. Co.* 12 N. Y. 120, 128; *People v. O'Brien*, 111 N. Y. 1, 37; *State ex rel. City of St. Louis v. Laclede Gas Light Co.*, 102 Mo. 472, 482; *Union Pacific R'y Co. v. Chicago, Rock Island & Pacific R'y Co.* 163 U. S. 564, 592, 10 U. S. App. 192. If the rule were otherwise no corporation, unless it had a perpetual existence, could acquire land in fee and in that event the objection made to the lease, based on the length of the term thereby created, would apply equally well if the grant had been in fee. The lease in question created an interest in land which was doubtless supposed to be of considerable value when the lease was executed and although the interest so created was what is usually termed a chattel interest, the term being less than a freehold, yet it was an interest which was salable during the life of the corporation or on its dissolution and might have become a very valuable asset of the bank. Such terms as the one created by this lease are sometimes as marketable as estates in fee and we perceive no reason why the instrument which created it should be held invalid any more than a deed conveying an estate in fee which would outlast the life of the bank. A corporation like a natural person, should be allowed to hold and enjoy a leasehold estate that will outlast its own existence, provided it can

be alienated at or prior to its dissolution. Moreover, the rule being that in such a case as the one at bar, the personal covenant of the corporation to pay rent would not be enforceable against it after the expiration of its charter, (*Lorillard v. Clyde et al.*, 142 N. Y. 456 and cases there cited) it is not apparent that any sufficient reasons exist, based on the length of the term, to render the lease invalid.

We are furthermore of opinion that the lease in controversy was not invalid because the gross rents payable during the term would have amounted to a sum exceeding $300,000, which was the amount of the bank's original capital. The gross rents that were to accrue and would have accrued at intervals during the 99-year term, if the lease had not been surrendered or cancelled, do not, in our judgment, constitute an indebtedness, within the fair intent and meaning of section 5202 of the Revised Statutes. The national bank act confessedly confers power upon national banks to lease property which they need for the convenient transaction of their business and it contains no express provisions limiting the duration of such leases. Their duration is left to be determined by the judgment and discretion of the bank or its board of directors. Very frequently such associations are compelled to pay a large annual rental and it can hardly be supposed that Congress intended that the various installments of rent that an association has obligated itself to pay under a lease for a long term of years, which it executed because it was necessary to do so to secure an eligible business location, should be aggregated and counted as a debt within the purview of section 5202, *supra*. Rent is one of those ordinary expenditures which such associations are compelled to incur and pay; and instalments of rent that are to be earned by the occupation of the demised premises in future years, and may never in fact be earned, can hardly be esteemed an indebtedness and certainly not an indebtedness within the fair purview of section 5202, until it has accrued. In *Deane v. Caldwell*, 127 Mass. 242, 244, it was held that before the day on which rent is covenanted to be paid, it is in no sense a debt. It was also held by the circuit court of the United States for the southern district of Ohio in *Fidelity Safe Deposit & Trust Co. v. Armstrong*, 35 Fed. Rep. 567, that rent which was to accrue in future, under the terms of a long lease taken by a national bank but which had not been actually earned by occupation, could not be proven, as against the receiver of the bank as a debt, it appearing that the receiver had declined to take possession of the demised premises and assume the burdens of the lease. It was also held by the Supreme Court of the United States in *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 19, that the annual instalments of rent which a city had agreed to pay to a water company for the period of twenty-five years, for the use of water, could not be aggregated and counted as a debt and added to the other indebtedness of the city for the purpose of showing that the city had contracted an indebtedness in excess of the amount permitted by its charter. See also *City of South Bend v. Reynolds*, 57 N. E. (Ind.) 706, 707. We conclude, therefore, that it cannot be successfully claimed that the bank exceeded its powers in

executing the lease because it thereby contracted an indebtedness in excess of the amount prescribed by section 5202 *supra*.

It follows from what has been said that if the lease in question was invalid when it was executed, that which rendered it so was the covenant of the bank to expend as much as $100,000 in the erection of a building on the demised premises. The bill avers that it spent more than that amount, to wit: the sum of $305,725; but the lease did not bind it to incur that expense and we fail to see any ground upon which Schleier, the lessor, can be held accountable to the creditors of the bank or to the United States because the bank saw fit to erect a more expensive building than it had engaged to build. The lessor, after the execution and delivery of the lease, was not in a situation where he could be heard to complain because the lessee was making more expensive improvements than it had agreed to make. Even if it be conceded, therefore, that the bank exceeded its powers in expending as much as $305,725 in the construction of a building, yet we are unable to hold that the lessor is chargeable with the amount of an excessive expenditure which he was powerless to prevent. Another fact to be kept in mind is that the case in hand is not one where the bank assumed to exercise a power which did not belong to it but it is a case where, in the exercise of a power which was clearly conferred, it misused or abused it by making a greater expenditure for an authorized object, than it ought to have made. Besides, the wrongful expenditure was made ten years before the present bill was filed. The building was completed in January, 1891, and the transaction at that time became an executed transaction. Moreover, while the matter was *in fieri*, no stockholder or other person authorized to complain, raised his hand to arrest the unauthorized expenditure, although the act was done publicly, nor did the United States, which granted the bank's charter, take any steps to arrest the unauthorized expenditure by the bank, on the ground that its charter was being violated. Furthermore, the act complained of was not *malum in se* but at most was simply *ultra vires*.

The question arises, therefore, whether the transaction in question is one of which the receiver of the People's national bank is authorized to complain. And this question, we think, should be answered in the negative. The receiver is one who was appointed by the comptroller under section 5234 of the Revised Statutes, to liquidate the affairs of the bank, it having become insolvent. As such receiver he is vested with all the rights of creditors and the rights of the corporation itself and may doubtless challenge any wrongful act which creditors could challenge, and maintain such suits against third parties, including actions against directors and stockholders of the bank on account of wrongful and fraudulent acts, as the corporation might maintain. *Hayden v. Thompson*, 17 C. C. A. 592, 71 Fed. Rep. 60 and cases there cited. But we think that in virtue of his office as receiver, he is not authorized to challenge or impeach an executed transaction between the bank and a third party, like the one now in hand, that was simply *ultra vires* and which, though known to the United States through its proper offi-

cials, at the time it was undertaken and consummated and while the excessive investment of its funds was being made, was neither arrested nor complained of by the United States or any creditor or stockholder of the bank. In *Case v. Terrell*, 11 Wall. 199, 202, it was held a receiver of a national bank represents the bank, its stockholders and creditors but that such officers do not *in any sense* represent the Government. A receiver of a national bank, therefore, by virtue of his appointment under section 5234, is not endowed with all those visitorial powers over national banks which the United States, acting in its sovereign capacity, may exercise. The United States, if it had thought proper to have done so, could have proceeded against the People's national bank for a forfeiture of its charter because of the alleged abuse or misuse of its charter powers. It did not do so, but permitted the investment to be made, evidently upon the theory that it would be profitable to the bank and not harmful to the public; and having done so a receiver, appointed by the comptroller years afterwards, has no right to impeach the investment and ask that it be declared void and that the property of a third party, who dealt with the bank in good faith, be charged with a lien for the sum expended, now that the investment has proven to be unprofitable.

There are some *ultra vires* acts, when committed by a national bank which the Government alone is permitted to call in question after such acts are committed. For example, in *National Bank of Xenia v. Stewart*, 107 U. S. 676, 678, where such a bank had loaned money on the security of its own stock in admitted violation of section 5201 of the Revised Statutes, the court decided, in substance, that if any one "*except the Government*" could challenge the transaction, it could only be done *before* the contract was executed. In the well-known case of *National Bank v. Matthews*, 98 U. S. 627, 628, 629, it appeared that a national bank had loaned money on the security of real property in violation of section 5136 of the Revised Statutes and was proceeding to foreclose the mortgage, whereupon the mortgagor sought to enjoin the foreclosure proceedings upon the ground that the mortgage was a nullity because the bank had no authority to accept it as security for a loan. It was held, however, that the act of making the loan on the security of real property, although *ultra vires*, did not render the mortgage void; that the mortgagor could not successfully resist the foreclosure proceedings because of the *ultra vires* character of the transaction; and that the United States *alone* could challenge it, doing so by a proceeding to oust the bank of its franchises. The court said that a private person could not directly or indirectly usurp this function of the Government but that it was the right of the Government to determine whether it would complain of the transaction. The same rule was reaffirmed in *Reynolds v. Crawfordsville Bank*, 112 U. S. 403, 413, and was followed and enforced by this court in *Sioux City Terminal Railroad & Warehouse Co. v. Trust Company of North America*, 27 C. C. A. 73, 83, 82 Fed. Rep. 124, 134. We are of opinion that the same doctrine is applicable, where, as in the present case, a national bank makes an excessive investment in real property for the purpose of obtaining

an eligible business location. Granting that it is guilty of an abuse of its powers in so doing and that while the act is under way a stockholder may enjoin the threatened wrong, yet, after the investment is made and the conveyance to the bank has been executed and delivered, it is not void but operates to vest in the bank such an estate as the conveyance, by its terms, creates. Moreover, when the conveyance is made and the funds of the bank have been invested therein, the estate so acquired becomes an asset of the bank and no one can question the transaction unless the Government, acting in its sovereign capacity, elects to do so. The remedy for the wrong is solely in the hands of the Government. A receiver appointed by the Comptroller of the Treasury on the insolvency of the bank, pursuant to section 5234 of the Revised Statutes, and armed simply with the rights of the corporation and its creditors, cannot do so.

The bill of complaint in this case does not charge or suggest that the cancellation and surrender of the lease on October 30, 1897, was inspired by an intent on the part of the bank or Schleier, the lessor, to hinder, delay or defraud the bank's creditors. The motives of Schleier, the lessor, in that transaction are not impugned. All that is alleged concerning the cancellation of the lease is that on September 20, 1897, when the bank was about to go into voluntary liquidation, a notice was issued by the president of the bank to stockholders, advising them of a meeting which had been called to be held on October 30, 1897, to consider the advisability of surrendering the lease to the lessor because the income from the building upon the demised premises had become less than the fixed charges. This statement, as contained in the notice to the stockholders, that the income was insufficient to meet the fixed charges, is denied in the bill only upon information and belief; but no allegation is contained therein showing what the income amounted to at that time, although it is admitted that two or three instalments of ground rent and certain taxes were at the time in arrears. The conclusion that may be fairly drawn from the averments of the bill, is that the leasehold had become a burden to the bank rather than an asset; that it was not salable and that the officers and stockholders considered it prudent and for the best interests of the bank to surrender the term and avoid liability for further instalments of rent. At all events, there are no allegations in the bill showing that the lease was fraudulently cancelled by collusion between the lessor and lessee and with a view of depriving the bank of an asset which was deemed to be of value, nor does the bill seem to have been filed with a view of obtaining relief on that ground. The bill was evidently framed upon the theory that the lease was void *ab initio* for want of power on the part of the bank to execute it and that the receiver could for this reason charge the amount that had been expended upon the demised premises in the erection of the building, as a lien upon the same, and upon the ground on which it was erected. We are of opinion, for the reasons already stated, that this theory is unsound. We conclude that the demurrer to the bill was properly sustained and that the decree below should be affirmed. It is so ordered.

Filed November 10, 1902.

(*Decree.*)

And on the tenth day of November, A. D. 1902, in the record of the proceedings of said circuit court of appeals is a decree in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1902.

MONDAY, *November* 10, 1902.

EDWIN F. BROWN, as Receiver of The People's National Bank of Denver, Colorado, Appellant,
vs.
GEORGE C. SCHLEIER and THE PEOPLE'S NATIONAL BANK of Denver, Colorado. } No. 1724.

Appeal from the circuit court of the United States for the district of Colorado.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Colorado, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs; and that George C. Schleier and the People's National Bank of Denver, Colorado, have and recover against Edwin F. Brown, as receiver of the People's National Bank of Denver, Colorado, the sum of twenty dollars for their costs herein and have execution therefor.

November 10, 1902.

(*Petition for and Order Allowing Appeal.*)

And on the twenty-ninth day of December, A. D. 1902, a petition for and order allowing appeal was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States, October Term, 1902.

EDWIN F. BROWN, as Receiver of the People's National Bank of Denver, Colorado, Appellant,
vs.
GEORGE C. SCHLEIER and THE PEOPLE'S NATIONAL BANK of Denver, Colorado, Appellees.
} No. —.

Petition for Allowance of Appeal to the Supreme Court of the United States.

To the Honorable Amos M. Thayer, as one of the judges of the honorable United States circuit court of appeals for the eighth judicial circuit:

Now comes your petitioner, the said appellant, Edwin F. Brown, as receiver as aforesaid, by Harper M. Orahood, Esq., and James H. Brown, Esq., his attorneys, and respectfully shows:

1. That the appellant is a Federal officer, and as such commenced this action in the United States circuit court of the eighth judicial circuit in and for the district of Colorado, and was and is prosecuting the same under the express authorization and direction of the honorable Comptroller of the Currency of the Treasury of the United States.

2. That the above-entitled cause is one in which the jurisdiction is not dependant upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States, and does not arise under the patent laws, under the revenue laws, or under the criminal laws, or in admiralty, but, on the contrary, is an action in equity, involving the construction of the national bank act, and the jurisdiction over this cause is dependent upon the fact that the appellant, as receiver of said national bank, is a Federal official, acting under the express authorization and direction of the honorable Comptroller of the Currency aforesaid.

3. That the matter in controversy in said cause exceeds the sum of one thousand dollars ($1,000) besides costs, viz., the sum of over three hundred thousand dollars ($300,000). That the same is an action to recover the assets of the estate of said The People's National Bank of Denver, to enable the honorable comptroller, in winding up the affairs of said national bank, to pay a judgment entered against the said bank for over the sum of four hundred and seventy-five thousand dollars ($475,000), upon default in the payment of which for thirty (30) days, the honorable Earl M. Cranston, the official predecessor of appellant, was duly appointed as receiver of said national bank by the honorable comptroller as aforesaid.

4. Your petitioner avers that by an opinion handed down and judgment entered on or about the — day of November, A. D. 1902, by the honorable circuit court of appeals for the eighth judicial circuit, adversely to your petitioner, there was error committed, to the great prejudice and damage of your petitioner, this

appellant, as he verily believes and as he is advised by counsel learned in the law, as to which said judgment and opinion he herewith accompanies this petition with an assignment of the errors which he avers have been committed by such judgment and opinion of said honorable United States circuit court of appeals.

Wherefore, your petitioner prays that, as by the statute in such cases made and provided, he may be allowed an appeal, and he herewith respectfully prays an appeal and the allowance of an appeal from the said judgment and decision of said honorable United States circuit court of appeals to the honorable Supreme Court of the United States, and that a transcript of the record and proceedings and papers upon which said appeal was made, duly authenticated, may be sent to the Supreme Court of the United States, as by the statute and rules in such cases provided, and for such other order in the premises as may be necessary and proper to secure appellate relief in the premises, and your petitioner will ever pray.

H. M. ORAHOOD,
JAMES H. BROWN,
Solicitors for Appellant.

And now, to wit, it is ordered on this the 29th day of December, A. D. 1902, that the appeal be allowed as prayed for above.

AMOS M. THAYER,
Judge of the U. S. Circuit Court of Appeals.

(Endorsed:) No. 1724. In the U. S. Supreme Court. Edwin F. Brown, as receiver, etc., appellant, *vs.* George C. Schleier *et al.*, appellees. Petition for allowance of appeal to the Supreme Court of the United States, and order allowing appeal. Filed Dec. 29, 1902 John D. Jordan, clerk. Harper M. Orahood James H. Brown, solicitors for appellant.

(*Assignment of Errors.*)

And on the twenty-ninth day of December, A. D. 1902, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States, October Term, 1902.

EDWIN F. BROWN, as Receiver of the People's National Bank of Denver, Colorado, Appellant,
vs.
GEORGE C. SCHLEIER and THE PEOPLE'S National Bank of Denver, Colorado, Appellees.
} No. —. Assignment of Errors.

Now comes the said appellant and says that in the record and proceedings aforesaid in the above-entitled cause, there is manifest error in this, to wit:

1. That the honorable circuit court of appeals erred in affirming the judgment of the honorable circuit court.

2. That the honorable circuit court of appeals erred in affirming the decision of the honorable circuit court in sustaining the several demurrers of the several appellees to the complaint of appellant, as amended.

3. That the honorable circuit court of appeals erred in not reversing the judgment of the honorable circuit court, for that the honorable circuit court erred in not overruling the several demurrers of the several appellees to the complaint of appellant, as amended.

4. That the honorable circuit court of appeals erred in not reversing the judgment of the honorable circuit court, for that the honorable circuit court abused its discretion and erred at the time and immediately after the time of handing down its opinion sustaining the demurrer of appellees herein, in refusing to give appellant time to secure a copy of said opinion, so as to prepare any proper amendment or amendments to its bill of complaint herein discovered or decided by said opinion as proper to be made to establish the cause of action sought to be set forth in his complaint herein, as amended.

5. That the honorable circuit court of appeals erred in not reversing the judgment of the honorable circuit court, for that, on sustaining said appellees' demurrer, said circuit court abused its discretion and erred in denying appellant's request for time and for leave to amend his bill of complaint as amended, by immediately entering up final judgment and dismissing appellant's bill of complaint as amended, without giving time to appellant to secure a copy of said opinion or to prepare and file proper or any amendments to said amended bill of complaint tendered for filing herein.

6. That the honorable circuit court of appeals erred in not reversing the judgment of the honorable circuit court, for that the honorable circuit court abused its discretion and erred in denying plaintiff's and appellant's request for leave to amend when he tendered his amended bill of complaint herein.

7. That the honorable circuit court of appeals erred in not reversing the judgment of the honorable circuit court, for — the honorable circuit — abused its discretion and erred in not permitting appellant to file said amended bill of complaint herein.

Wherefore, appellant prays that the several orders, judgments and decrees sustaining the several demurrers of the said appellees to the bill of complaint of appellant as amended, and dismissing the said cause and denying the appellant the right to file his amended bill of complaint herein, and affirming the judgment of the honorable circuit court, may each be severally reversed, annulled and altogether holden for naught, and that he may be restored to all things which he hath lost by reason of said several orders, judgments and decrees aforesaid.

HARPER M. ORAHOOD,
JAMES H. BROWN,
Solicitors for Appellants.

(Endorsed:) No. 1724. In the U. S. Supreme Court. Edwin F. Brown, receiver, appellant *vs.* George C. Schleier *et al.* appellees. Assignment of errors. Filed Dec. 29, 1902. John D. Jordan, clerk. Harper M. Orahood & James H. Brown, solicitors for appellant.

(*Bond on Appeal.*)

And on the twenty-ninth day of December, A. D. 1902, a bond on appeal was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

Know all men by these presents, that we, Edwin F. Brown, as receiver of the People's National Bank of Denver, Colorado, as principal, and the American Bonding Company of Baltimore, in the State of Maryland, and Ralph W. Smith, as sureties, are held and firmly bound unto George C. Schleier and the People's National Bank of Denver, Colorado, in the full and just sum of five hundred dollars ($500), to be paid to said Schleier and bank, their agents, attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our successors, heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 26th day of December, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a session of the United States circuit court of appeals in and for the eighth judicial circuit, in a suit depending in said court between said Edwin F. Brown as receiver as aforesaid, as appellant, and said George C. Schleier and The People's National Bank of Denver, Colorado, as appellees, a final judgment was rendered against said Brown as receiver, and the said Brown, as receiver, having duly prayed and obtained the allowance of an appeal and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said George C. Schleier and the said The People's National Bank of Denver, Colorado, citing and admonishing them and each of them to be and appear at the Supreme Court of the United States to be holden at Washington on the 28th day of January, A. D. 1903.

Now, the condition of the above obligation is such that, if the said Edwin F. Brown, as receiver, and his successors, shall prosecute said appeal to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

EDWIN F. BROWN, *As Rec'v'r, &c.*,
By JAS. H. BROWN, *Att'y.* [SEAL.]
AMERICAN BONDING COMPANY
OF BALTIMORE,
By RALPH W. SMITH, *Vice-President.*

Attest:
[SEAL.]
L. K. HARDEN, *Ass't Secretary.*
RALPH W. SMITH. [SEAL.]

Approved this 29th day of December, A. D. 1902.

AMOS M. THAYER,
U. S. Circuit Judge, Eighth Circuit.

STATE OF COLORADO,
County of Arapahoe, City and County of Denver, } ss:

On this 26th day of December, A. D. 1902, before me, the subscribed notary public, for the State of Colorado, residing in the city — Denver, came Ralph W. Smith, vice-president of the American Bonding Company of Baltimore, to me personally known to be the vice-president of the said American Bonding Company of Baltimore, a corporation described in and which executed as surety the annexed bond, and being by me first duly sworn, stated, that L. K. Harden is assistant secretary of the American Bonding Company of Baltimore, and that the said Ralph W. Smith, as vice-president, and L. K. Harden as assistant secretary, duly executed the preceding instrument by order and authority of the directors of the said American Bonding Company of Baltimore, and that the seal affixed to the preceding instrument is the corporate seal of the said company; that the said corporate seal was duly affixed by the authority of the directors of the said company; that the said American Bonding Company of Baltimore, of the State of Maryland is duly and legally incorporated under the laws of the State of Maryland, is authorized under its charter to transact and is transacting the business of a surety company in the State of Missouri & District of Columbia that said company has complied with all the laws of the State of Missouri & District of Columbia relating to surety companies doing business in that State; and is duly licensed and legally authorized by such State to qualify as sole surety on the bond hereto annexed; that the said company is authorized by its articles of incorporation, and by its by-laws, to execute the said bond; and that said company has assets consisting of capital stock paid in cash and surplus over and above all its liabilities of every kind, exceeding the sum of one million dollars ($1,000,000.00), and that said Ralph W. Smith, as vice-president, and L. K. Harden as assistant secretary of the said company, have been duly authorized by the board of directors of the company to execute the foregoing bond.

RALPH W. SMITH,
Vice-President.

Subscribed and sworn to before me, this 26″ day of Dec., A. D. 1902.

My commission expires Mar. 9″, 1904.
" " " Dec. 4″, 1906.

[SEAL.] JUNE A. MOWER,
Notary Public.

(Endorsed:) Bond. Edwin F. Brown, receiver, *vs.* George C. Schleier & The People's National Bank. Filed Dec. 29, 1902. John D. Jordan, clerk.

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(*Citation.*)

And on the fifth day of January, A. D. 1903, a citation, with the marshal's return endorsed thereon, was filed in the clerk's office of said circuit court of appeals, the original of which is hereto attached and herewith returned.

The United States of America to George C. Schleier and The People's National Bank of Denver, Colorado, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the date this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein Edwin F. Brown, as receiver of the People's National Bank of Denver, Colorado, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Amos M. Thayer, one of the judges of the United States circuit court of appeals, for the eighth circuit, this 29th day of December in the year of our Lord one thousand nine hundred and two.

AMOS M. THAYER,
United States Circuit Judge for the Eighth Circuit.

[Endorsed:] Original. 1291. Supreme Court of the United States, October term, 1902. No. —. Edwin F. Brown, as receiver of the People's National Bank of Denver, Colorado, appellant, *vs.* George C. Schleier, *et al.*, Citation. Filed Jan. 5—1903. John D. Jordan, clerk.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

I hereby certify that I received the within citation on the first day of January, A. D. 1903, and that thereafter and on the second day of January, A. D. 1903, I duly executed the same at the city of Denver, within the said district, by handing to and leaving with the within-named appellees, George C. Schleier and The People's National Bank of Denver, Colorado, true and correct copies of the within writ, by delivering said copies personally to the said Schleier and to James H. Clemes, as the cashier of said The People's National Bank of Denver, Colorado.

DEWEY C. BAILEY,
U. S. Marshal for said District,
By A. L. LONG,
Deputy Marshal.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

I hereby certify that I received the within citation on the first of January, and I duly executed the same by handing to and leaving with, a true and correct copy of the within writ to George C. Schleier and James H. Clemes, personally on January 2nd, 1903, at Denver, Colorado.

DEWEY C. BAILEY, *Marshal,*
By A. L. LONG, *Deputy.*

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing one hundred twenty-three pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said circuit court of appeals, in a certain cause wherein Edwin F. Brown, as receiver of the People's National Bank of Denver, Colorado, was appellant, and George C. Schleier and The People's National Bank of Denver, Colorado, were appellees, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original citation with the marshal's return endorsed thereon is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of said circuit court of appeals, at office in the city of St. Louis, Missouri, in the eighth circuit, this tenth day of January, A. D. 1903.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 18,782. U. S. circuit court of appeals, 8th circuit. Term No. 554. Edwin F. Brown, as receiver of the People's National Bank of Denver, Colorado, appellant, *vs.* George C. Schleier and The People's National Bank of Denver, Colorado. Filed January 13, 1903.

17710

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 554.

EDWIN F. BROWN, AS RECEIVER OF THE PEOPLE'S NATIONAL BANK OF DENVER, COLORADO, APPELLANT,

vs.

GEORGE C. SCHLEIER AND THE PEOPLE'S NATIONAL BANK OF DENVER, COLORADO, APPELLEES.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT FOR APPELLANT.

This is an equitable action. The appellant receiver and his predecessor commenced and prosecuted this suit against the appellees, Schleier and Bank, under the express direction of the comptroller of the currency. The case involves the right of the comptroller and his receiver to follow and recover the capital and money assets of an insolvent national bank.

I.

THE STATEMENT OF FACTS,

With the insertion, in chronological order, of *important facts alleged*, in *overlooking which* the learned courts below fell into error, is as follows:

The paragraphs ending with specific references to the record are facts overlooked by the court. The other paragraphs are the statements of the opinion. (118 Fed., —.)

1. This case passed off below on a demurrer to the bill of complaint, which was once amended before the demurrer thereto was sustained. (C. C.), 112 Fed., 577.

2. The appellant receiver's motion for leave to file amended bill of complaint after the demurrrer was sustained, was denied. This is also assigned as error. (Motion for leave to file, Record, page 44, folio 64-72; Amended Complaint, Record, page 48, folios 72-129; Order overruling motion to file amended Complaint, Record, page 87, folio 130.)

3. The case made by the bill of complaint, as amended, is as follows:

The People's National Bank of Denver, one of the appellees, was incorporated on July 30, 1889, under the National Bank Act, for the period of 20 years, from July 1, 1889, with a capital stock of $300,000, divided into shares of $100 each.

4. The People's Savings Bank—hereinafter sometimes called "Savings Bank"—was a Colorado corporation, existing July 19, 1889, having a paid-up capital of $50,000 until January 10, 1893, and there-

after of $100,000. (Amended Complaint, Record, page 74, section 31.)

Said Savings Bank had aggregate deposits of savings of tradesmen, mechanics, laborers, servants, minors, and others, on August 1, 1889, when the National Bank commenced business, of about $200,000 (Amended Complaint, Record, page 75, section 33.)

These deposits rapidly increased to about $1,270,000, in April and May, 1893. (Amended Complaint, Record, page 75, folio 109, section 33.)

Long prior to the hereinafter mentioned lease by Schleier to the National Bank, viz., from its opening for business on August 1, 1889, until the 29th of June, 1895, when the Savings Bank made its general assignment hereinafter mentioned, the Savings Bank was a depositor of its said deposits with said defendant National Bank. (Amended Complaint, Record, page 75, folio 109, section 34.)

5. On September 12, 1889, it leased a lot of ground in the city of Denver, having a front on Lawrence street of about 90 feet, from George C. Schleier, one of the appellees, for the term of 99 years, from February 1, 1890, at a yearly rent of $13,975, which rent was to be paid in monthly installments of $1,164.58 during each month of the term.

6. The lessee, the People's National Bank, hereafter sometimes termed the "Bank," covenanted in the lease to erect within 18 months from and after February 1, 1890, at its own cost and expense, a substantial building, not less than four stories in height, to cost not less than $100,000.

7. By the terms of the lease, the lessee was to have no right to remove the building, but the same was to become a part of the realty.

8. By the express terms of the lease, Schleier could not acquire title to the buildings and improvements erected until the possession of the demised premises was surrendered and yielded up at the expiration of the said term or its extension. (Lease, Complaint as Amended, Record, page 7, folio 10; Amended Complaint, Record, page 55, folio 81.)

9. The lease also gave to the lessee and its assigns an option to extend the lease for the same rental for a term of 50 years from and after the expiration of 99 years.

10. The Bank took possession of the demised premises, and on or about the month of January, 1891, had completed the erection of a building thereon, eight stories in height, at a cost of $305,725.39.

11. The National Bank retained possession of the Bank building and premises, reporting the same as an asset at its cost value, about $305,000, until the execution of the deeds of conveyance and surrender of the lease by the National Bank to Schleier, October 30, 1897. (Complaint as Amended, Record, pages 20 to 24, folios 28-33, section 23; also Schleier's Demurrer, Record, page 31, folio 44; also Amended Complaint, Record, page 76, folios 36 to 81, paragraph 43.)

12. On July 19, 1893, the Bank became unable to pay its depositors in due course of business, and the comptroller of the currency appointed J. B. Lazear as receiver thereof, pursuant to the provisions of the national bank act.

13. Said Lazear remained in possession of its assets and affairs until August 21, 1893, when he was discharged; the Bank having, in the meantime, levied an assessment of 20 per cent. upon its shareholders,

and thereby restored its capital so that it was deemed safe for it to resume.

14. That at all the times subsequent to July 19, 1893, the National Bank was and is insolvent. (Complaint as Amended, Record, page 36, folio 52, section 15.)

15. At the date last mentioned the business and affairs of the Bank had become involved somewhat, and commingled with the business of another bank known as the People's Savings Bank, which latter Bank was located and did business in the Bank building that had been erected by the People's National Bank, in which the latter bank also transacted its business.

16. The People's Savings Bank, having become embarrassed, subsequently made an assignment to Fermor J. Spencer, assignee, who thereafter, on June 26, 1897, brought an action against the People's National Bank, in which action he recovered a judgment against it in the sum of $475,825.71 on November 30, 1899.

17. From June 29, 1895, the date of the assignment of the Savings Bank to Spencer, until November, 1896, the National Bank admitted that it was the debtor of the Savings Bank, but thereafter, until the rendition of said judgment, denied all liability. (Complaint as Amended, Record, page 37, folio 54, section 16b.)

The pendency of said action wherein said judgment was rendered was well known to appellee Schleier. (Complaint as Amended, Record, pages 24-5, folio 33, section end of 24; Amended Complaint, Record, page 83, folio 124, end of section 46.)

18. About the month of January, 1897, the People's National Bank commenced to liquidate its affairs with a view of surrendering its charter, and, on April 27, 1897, its stockholders, at a meeting duly held for that purpose, resolved to go into voluntary liquidation.

19. June 26, 1897, the National Bank agreed with assignee Spencer of the Savings Bank with a view to giving "time for better understanding," that if Spencer would refrain from pressing suit until January 1, 1898, it should be without prejudice by reason of such delay, and the Bank would "take no further action for the surrender of its charter or the disposal of its property to the prejudice of plaintiff, assignee Spencer. (Complaint as Amended, Record, pages 38-9, folio 56, section 16d.)

20. On September 20, 1897, the Bank called a meeting of its stockholders to consider a proposition to surrender the remainder of its leasehold term to Schleier, the lessor, stating in its notice to the stockholders that, as the income from the property which it had leased was less than the fixed charge, it had become necessary to take some action to relieve the Bank.

21. The representation in said stockholders' notice, that the income of the Bank building was less than the fixed charges, was false. The rent and income of the property was sufficient to pay the fixed charges and keep the building in good order and repair. (Complaint as Amended, Record, page 19, folio 26, section 21; Amended Complaint, Record, page 69, folios 100-1, section 26.)

22. At that time there was due for rent in arrears under the lease, and for taxes which the lessee

was obliged to pay, a sum amounting, altogether, to about $6,000.

23. Schleier refused to exercise the remedy of public sale given by the lease (Lease, Record, page 9, folio 12), which would have more than paid his indebtedness and left a balance for the payment of debts and liabilities of other creditors of the Bank. He held over the Bank and stockholders the threat of holding them personally liable for the rental for the unexpired portion of the ninety-nine-year term of the lease. (Amended Complaint, Record, page 70, folio 102, section 28.)

24. In compliance with action which appears to have been taken at said stockholders' meeting, the Bank, subsequently, on October 30, 1897, surrendered its leasehold term to the lessor, and the lessor agreed, in consideration of such surrender, to discharge the Bank from its liability.

25. The stockholders, directors and officers of the National Bank utilized and applied the excess value of the $305,000 Bank building above Schleier's demand of $6,000, to discharging themselves and the Bank from liability for future rent for the unexpired balance of the ninety-nine-year term of the lease. (Consideration of deeds from Bank to Schleier; Complaint as Amended, Record, page 21, folio 29; page 23, folio 31; Amended Complaint, Record, page 72, folio 105; page 73, folios 106, 107.)

The honorable comptroller of the currency, upon his own motion, appointed Earl M. Cranston receiver, December 20, 1899. (Complaint as Amended, Record, page 20, section 25.)

26. October 27, 1900, the honorable comptroller of the currency directed the receiver to commence

and prosecute this action. (Complaint as Amended, Record, page 25, folio 34, section 28.)

27. He continued to serve as receiver until May 27, 1901, when he resigned his office, and Edwin F. Brown, the present receiver and appellant, was duly appointed in his place and stead by the comptroller of the currency.

28. In view of the premises, the complainant prayed that the court would decree that the lease executed by Schleier to the Bank on September 12, 1889, was null and void, in view of the national bank act; that the agreement purporting to cancel and surrender said pretended lease was also null and void; that there might be a full accounting between Schleier and the receiver; and that whatever was found due to the receiver upon said accounting be declared a first and prior lien upon the Bank building which the Bank had erected, as well as upon the ground upon which it was situated.

29. The bill was demurred to for want of equity, and the demurrer was sustained, whereupon a decree was entered dismissing the complaint.

30. The argument was heard and the demurrer sustained by Judge Riner, district judge of Wyoming, on December 30, 1901.

Although the receiver's counsel immediately asked leave to file an amended complaint, leave was denied, and final judgment at once entered, dismissing the case, and he at once left Colorado.

Thereafter, at the same term of court, on January 27, 1902, before any change of conditions of parties litigant, the receiver prepared, and moved before him (Riner, J.) on his return to Colorado, for leave

to file an amended bill of complaint. The motion, together with the amended bill, comprises pages 44 to 86 of the record. It was, at the same term, viz., on February 1, 1902, denied, and this is also assigned as error.

II.

ERRORS ASSIGNED.

The ruling at the Circuit Court was made in sustaining the demurrer to the bill of "*complaint as amended.*"

These amendments are found in the record at pages 36-9.

Immediately on the oral announcement sustaining the demurrer, the court entered final judgment, dismissing the bill. The appellant receiver then and there asked leave to amend. Subsequently, at the same term of the court, and before any change in existing conditions, he prepared and tendered his "*amended bill of complaint.*" found at pages 49 to 86 of the record.

The errors assigned in this and the appellate court are:

1. The sustaining of the demurrers of Schleier and the Bank to the "*complaint as amended,*" for want of any equity therein; and,

2. The refusal of permission to appellant receiver to file the "*amended bill of complaint*" tendered.

III.

IF EITHER THE "BILL OF COMPLAINT AS AMENDED" OR "THE AMENDED BILL OF COMPLAINT" STATED ANY FACTS ENTITLING APPELLANT RECEIVER TO ANY KIND OR EQUITABLE RELIEF, THE GENERAL DEMURRER WAS WRONGFULLY SUSTAINED, AND THE MOTION TO FILE THE "AMENDED BILL OF COMPLAINT" WAS IMPROPERLY DENIED.

The Circuit Court gave no reasons for denying the motion. Its opinion was to the effect that the transaction was *ultra vires*, and that nobody but the government of the United States could complain. (Record, page 97.) As the amended complaint did not and could not by any of its allegations alter that conclusion, we may assume that such was the reason that prompted the denial of appellant receiver's motion to file the "amended bill of complaint" tendered.

Therefore, in considering the denial of appellant receiver's motion to file an "amended bill of complaint," the ruling is substantially the same as that of a general demurrer to a "bill of complaint as amended."

The demurrer which was sustained was a *general* demurrer, for want of equity in the bill.

The bill contained a *general* prayer for relief, therefore,

"1. If the bill sets forth facts showing the right to any relief, upon any theory of the bill, the demurrer was erroneously sustained." (Taylor vs. Ins. Co., 9 How., 390, 406; Stevens vs. Gladding, 17

How., 447, 455; Patrick vs. Eisenhart, 20 Fed., 339, 340; Miller, J., in Merriam vs. Holloway Pub. Co., 43 Fed., 450, 457; Blatchford, J., in Perry vs. Littlefield, 17 Blatch., 272; s. c., 19 Fed. Cas., 285, 290; M. T. & D. Co. vs. R. I. Hospital Trust Co., 36 Fed., 863, 866; C. M. & St. P. Ry. Co. vs. Hartshorn, 30 Fed., 241, 243.)

2. No objections to the *form* of the allegations of the complaint is presented. (Christmas vs. Russell, 5 Wall., 290, 303.)

3. The allegations of the complaint must be taken to be true, for the purposes of this demurrer.

> "The question is, whether the facts as stated, if true, constitute a sufficient cause of action. (U. S. vs. Piatt & Salsbury, 157 U. S., 113, 118; Christmas vs. Russell, 5 Wall., 290, 303; Simmons vs. Saul, 138 U. S., 439, 457.)

4. The demurrer not only admits all the material facts well pleaded, but also all the necessary intendments and inferences of and from such facts.

> "Necessary circumstances implied by law need not be expressed." (Sullivan vs. Iron Silver Min. Co., 109 U. S., 550, 555; Supply Ditch Co. vs. Elliott, 10 Colo., 327, 332.)

IV.

THE TWO QUESTIONS PRESENTED ARE:

I. Can the People's National Bank, while insolvent, and in course of voluntary liquidation, as against appellant receiver, who represents then existing creditors (the People's Savings Bank and its depositors), lawfully convey away its Bank building, representing the then form of its $305,000

capital and moneys, to creditor landlord Schleier, upon the considerations of,

The satisfaction of

(1) About three months' back rent, due landlord Schleier, amounting to $6,000; and

(2) All future accruing rent for over ninety-one (91) years more, and

(3) The release of the stockholders and Bank from liability on personal covenants of the lease therefor,

And leave unsatisfied the judgment of such creditors, represented by such receiver, for $475,825.71, although such indebtedness (a) was owing by the Bank long before Schleier's rent accrued, and (b) was in suit long before Schleier acquired either any title to, or possession of, the Bank building?

II. Schleier's title to the Bank's capital—the building—being executory (through the National Bank's continuous possession of the building until its aforesaid surrender and reconveyance, on October 30, 1897), can the appellant receiver, under above circumstances, representing creditors of the National Bank ever since July 19, 1893 (allegations of "complaint as amended")—in fact, ever since National Bank's organization, August 1, 1889, and before the lease was made (allegations "amended bill of complaint")—have a cancellation and rescission of the lease covenants, whereunder Schleier claims title to such building, the then form of the Bank's $305,000 capital and assets?

The General Theory of the Action Is—

a. That the capital and moneys of the People's National Bank was by its charter contract with the Savings Bank and its depositors impressed with the

public duty to be at all times kept out of real estate, and in the general form of currency, and used in the conduct of the solvent business of a national bank, according to the act of Congress, "the national bank act," so as to repay the Savings Bank and its depositors the full amount of their deposit debts, on demand, in the due course of business.

b. That the transaction between Schleier and the National Bank, when it had only been in business one month and eleven days, whereby it put its $305,000 (more than its entire share capital) into an eight-story office building, of which it and the Savings Bank only occupied one-half of one floor, was a disabling and abandonment, by the National Bank, from the performance of such public duties, as a quasi-public corporation, in violation of its charter contract with the government and the Savings Bank and its depositors, to at all times maintain a solvent, going national bank, so as to repay them their debts, entitling this appellant receiver, as their representative, to follow and recover such capital and moneys, now in the form of the building, from Schleier, in order to pay the $475,825.71 judgment due the Savings Bank and its depositors.

c. The principles applied in the following cases are, among others, relied on as sustaining the action:

> "The individual partners in a private bank were also directors in a national bank, and by reason of their position became possessed of a large part of the means of the national bank, which they used in their own business. They assigned all their property to trustees for the benefit of their creditors. The national bank also suspended and went into the hands of a receiver;

Held, that the receiver was entitled to the surrender of as much of the property as had been actually purchased with the moneys of the bank, as he might elect. (Syllabus, page 671.)

"Formerly, the equitable right of following misapplied money or other property into the hands of the parties receiving it, depended upon the ability to identify it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, viz., to that which was procured in place of it by exchange, purchase or sale. * * * Finally, however, it has been held as the better doctrine, that *confusion does not destroy the equity* entirely, but *converts it into a charge upon the entire mass*, giving the *party injured* by the unlawful diversion *a priority* of right over the other creditors of the possessor." (Opinion, page 693.)

Peters vs. Bain, 133 U. S., 670, 671, 693.

"A *receiver* of a national bank *may maintain a bill* in equity to discharge sureties on a bond given to dissolve an illegal attachment against the bank, *and recover* from the possession of such sureties, *assets of the bank deposited with them* to indemnify them against loss on such bond."

Pacific Natl. Bank vs. Mixter, 124 U. S., 721, 729.

"When a *loss has been caused by the appropriation of the funds of a corporation to a purpose unauthorized by its charter*, or by culpable negligence, or by a conversion of its funds, all those who are chargeable with the fault which has occasioned the loss, are liable for the entire misappropriation, without regard to the degree of dereliction of which each is guilty.

"A bill by the receiver of a national bank against its officers and directors, for the unlawful diversion of funds of the bank, is sufficient to support a recovery, when the diversion is proved. The gravamen of the bill is the fact of unlawful diversion.

"A *national bank has no power to prosecute a mining business* on property which it has acquired, much less to expend its funds in prospecting for mineral on such property."

Cooper vs. Hill, Receiver, 94 Fed., 582.

"Whenever the legal title to property is obtained through means, or under circumstances, which render it unconscionable for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and *a court of equity* has jurisdiction to *reach the property* either *in the hands of the original* wrongdoer, *or in the hands of any subsequent* holder, *until a purchaser of it in good faith and without notice* acquires a higher right and takes the property relieved from the trust."

Moore vs. Crawford, 130 U. S., 122, 128.

V.

THE APPELLATE COURT WHOLLY MISAPPREHENDED THE ACTION.

IT CONSIDERED THE ISSUE TO BE WHETHER SCHLEIER'S LEASE WAS VOID SO IT VESTED NO ESTATE IN THE BANK,

WHEREAS THE ISSUE WAS WHETHER THE LEASE AND ITS SURRENDER WAS VALID TO BIND THE BANK'S CREDITORS AND RECEIVER TO LOSE TO SCHLEIER ITS BUILDING, INTO WHICH FORM IT PUT ITS $305,000.00 CAPITAL AND CASH, UNDER ITS COVENANTS IN SUCH LEASE.

The learned appellate court said:

> "The theory of the bill was that the lease was void. The *lessor Schleier* is, therefore, *liable*, as joint tort feasor, *for* all *damages* which the *creditors* of the Bank have sustained *in consequence of the execution* (signing and delivery) of the lease (on September 12, 1899) without lawful authority." (Record, 106, lines 1-10; also 109, lines 3-6.)

This is incorrect. Such an action "for damages" would be *at law*, and *not* in *equity*. Judgment would be asked against Schleier for some certain amount, instead of, as here, for an accounting, but not for past payments of rent under the lease.

The view of the opinion is:

a. Schleier's lease (*not* as a building lease) "*vested an estate*" in the Bank;

b. That the vesting of such estate—the whole 99-year term—was *fully "executed"* at the signing and delivery of the lease, September 12, 1889.

c. That "the act complained of (converting $305,000.00 capital and money into Bank building) was not *malum in se*, but, at most, was simply *ultra vires*. (Record, page 109, lines 32-4).

d. Therefore, the Bank's receiver and creditors can not, but only the government can complain of this *ultra vires* transaction, whereby the Bank (in changing the form of its assets) gained (?) an estate—the leasehold.

We respectfully submit that this view of the learned appellate court not only limits, but completely reverses the theory of the bill, in a manner totally inconsistent with the admitted allegations.

That only the government may complain of an executed, *ultra vires* conveyance of real estate to a corporation is conceded. The corporation and its creditors have *gained* something, and are presumed not to be harmed, but to be benefited.

The vital difference between the view of the opinion and the allegations of the bill lies in this: The bill deals with a *loss*, the opinion with a *gain*. The bill concerns a loss of assets which the Bank always had, first in cash, $305,000.00, and then in the

building; while the opinion concerns the gaining of a chattel real, the vesting of the term of the 99-year lease.

The bill presents a case involving the Bank's end of the transaction concerning its title, and its obligations touching its own admitted assets, its $305,000.00 capital and moneys, that it put into the building—rather than its acquisition of title to an estate, by the lease from Schleier.

The opinion recognizes these two different phases. While it declares that the lease as a conveyance vested an estate—the full 99-year term—in the Bank, on the execution of the lease (Record, page 111, lines 3-6), yet it also holds that its *personal* covenant to pay the rental for 99 years did not bind the Bank any longer than it had actual possession. (Record, page 108, lines 26-38.)

By section 5234, the receiver is authorized to collect and recover "*assets of every description*," and "all claims belonging to" the insolvent National Bank.

The controversy is not whether the lease made by Schleier to the Bank passed any estate to the Bank for all or any part of the 99 years.

The transaction complained of is not the act of the Bank in converting its capital and moneys—$305,000—into the form of the Bank building, completed in January, 1891.

On the contrary, the transaction complained of is the loss of the moneys and assets of the Bank—in the form of the Bank building—to which Schleier claims title, through the conveyances and surrender, on October 30, 1897, under the terms of his lease to the Bank.

The opinion says:

> "After the investment is made and the conveyance to the Bank (the lease) has been executed and delivered, it operates *to vest in the Bank* such an estate as the conveyance, by its terms, creates." (Record, 111, lines 3-6.)

While denying the sufficiency of the lease to lawfully bind either the Bank or its title to its $305,000 capital assets, we say, very well, then! Since in the completed building in the actual possession of the Bank, it still had an asset, the then depositors, now judgment creditors of this Bank, represented by this appellant receiver, want to know why Schleier, who is not an innocent purchaser for value without notice, should not be held liable to account for this asset, the building?

The learned court below fell into error by ignoring the following important facts:

1. The action was to follow and recover $305,000, capital and moneys of the Bank, put by it into the form of the Bank building, under its covenants in the lease.

2. That the *National Bank retained* the *actual possession* of its $305,000, capital and moneys, *and* thereafter the *building*, until October 30, 1897, thereby making *Schleier's claim* under any of the covenants of the lease *executory*, and,

3. That Schleier was not an innocent purchaser of the building for value, without notice.

VI.

SCHLEIER WAS NOT AN INNOCENT PURCHASER, FOR VALUE, WITHOUT NOTICE.

THE TRANSACTION COMPLAINED OF IS:

The Bank's loss of its assets, the $305,000 building, to creditor landlord Schleier, on October 30, 1897,

WHEN SUCH NATIONAL BANK

(a) WAS INSOLVENT,

(b) WAS IN COURSE OF VOLUNTARY LIQUIDATION, AND

(c) WHILE SPENCER'S SUIT AS ASSIGNEE OF PEOPLE'S SAVINGS BANK,

(1) Then pending since June 26, 1897,

(2) Upon the Bank's debtor relation, existing ever since National Bank's organization, August 1, 1889,

(3) Resulted in a $475,825.71 judgment against the National Bank, on November 20, 1899, and

(d) WHEN SCHLEIER HAD FULL KNOWLEDGE OF SUCH PENDING SUIT,

(e) TOOK HIS TITLE AND POSSESSION OF SUCH BUILDING IN VIOLATION OF THE AGREEMENT BETWEEN THE BANK AND SPENCER, THAT THE BANK'S ASSETS SHOULD NOT BE DISPOSED OF, AND

(f) **UPON THE UNLAWFUL CONSIDERATIONS OF**

(1) Preferring Schleier's debt for past and future rent for ninety-one (91) years ($1,275,000), the balance of ninety-nine-year term, and

(2) The discharge of Bank's shareholders upon Bank's personal covenant for such future rent.

(3) And,—following the opinion that the Bank's personal covenant was not a liability to pay to Schleier future accruing rent, then,—

(g) **UPON THE GROSSLY INADEQUATE CONSIDERATION OF A $305,000 BUILDING TO PAY ONLY A $6,000 DEBT,**

A DISPARITY IN CONSIDERATION ITSELF SUFFICIENT TO RAISE A PRESUMPTION OF FRAUD, BETWEEN SCHLEIER AND THE BANK, CALLING FOR EXPLANATION.

Schleier was not an innocent purchaser.

Schleier's general demurrer admits the following to be the facts:

1. That *Schleier made the lease*, containing the Bank's covenants calling for, and under which it made, the wrongful expenditure of its $305,000, capital and moneys, in the building.

The opinion, while not expressly so stating, conveys the impression that Schleier was an innocent party.

It says appellant "receiver is not authorized to challenge or impeach an executed transaction between the Bank and a *third party,* etc." (Record, bottom page 109, lines 48-50.)

Also, that "we fail to see any ground upon which Schleier can be held accountable to the creditors of the Bank or to the United States, because the Bank saw fit to erect a more expensive building than it had engaged to build." (Record, page 109, lines 9-11.)

The opinion wrongfully states the covenant of the Bank as being "expend *as much as* $100,000." (Record, page 109, line 5.)

The *Bank's covenant was* to use its moneys in constructing the "building *not less than* four stories in height, to *cost not less than* $100,000." (Record, page 7, folio 9.)

The phrase, "not less than," is *a minimum*, and *not* a maximum, limitation in the Bank's covenant.

Any *expenditure in excess* of the $100,000 is *as much within* the covenant *as the actual* sum of $100,000.

By this *phrase, "not less than," Schleier gave* his *consent to the construction of the more expensive* building, *just as much as he* thereby *withheld* his *consent to* the construction of a *less* expensive one, and showed that such an one would not be within the Bank's covenant.

The covenant for the construction of the building is an act essentially entire in its nature. The building is an entire thing. If any part of the covenant, act or structure was unlawful, then, by the principle applicable to entire considerations, the whole must be unlawful. (Hedges vs. Dixon County, 150 U. S., 182.)

Courts do not apportion the responsibility between wrongdoers, whether the acts are advisory only (Cooley on Torts, 2d Ed., 155-6*, 134-5), "or separate and independent acts." (States vs. Mosereau, 64 N. Y., 138.)

> "If a person accept property, he adopts the means by which it was procured, or, as Lord Chief Justice Wilmot said, 'Let the man receiving a gift be ever so chaste, yet, if it comes through a polputed channel, the obligation of restitution will follow it.'" (1 Perry on Trusts (5th Ed.), section 211; Moore vs. Crawford, 130 U. S., 122, 128.)

Schleier must elect to either treat the whole performance and building as within the terms of the covenants he exacted, and accept the inseparable burdens, or reject the whole of it, as not within the Bank's covenants.

To the opinion's suggestion, that Schleier was helpless after the lease was signed, we reply that he could have cleared himself by notifying the Bank that he would not be responsible for the consequences which might flow from any expenditure over the $100,000. This he never did.

So far he has always claimed the entire $305,000.00 *eight*-story building, under the lease and the Bank's conveyance to him of October 30, 1897, as his property. He can not blow hot and cold.

He therefore occupies the legal status of insisting that the building, as built, was constructed in compliance with the Bank's covenants. He must, therefore, accept the burdens of that position.

In any event, Schleier's liability does not in any respect measure the corporate powers of the Bank. Unless, as will be shown, he be an innocent purchaser, for value without notice, he can not keep the $305,000.00 capital of the Bank—the building.

2. Schleier's demurrer admits that he took a conveyance from the Bank of its building, on October 30, 1897, when he took a surrender of the lease, well knowing,

a. That the suit of assignee Spencer, to recover hundreds of thousands of dollars, due from the National Bank to the Savings Bank and its depositors, due ever since the Bank's failure in 1893, and *prior* thereto, had been pending since June 26, 1897.

This suit resulted, November 20, 1899, in judgment against the National Bank for $475,825.71. (Record, pages 24-5, folio 33, and section 24; Record, page 83, folio 124, and section 46.)

The Bank's conveyance of the building, pending the suit against it by Spencer for such a large amount, was a fraud. (Venable vs. Bank, 2 Peters, 107, 112; Trust Company vs. Sedgewick, 97 U. S., 304, 307.)

b. Schleier's knowledge of this suit put upon him the burden of inquiry, and charged him with notice of what he might have ascertained by the exercise of reasonable diligence. (McClure vs. Twp. of Oxford, 94 U. S., 429, 432; The Kate, 164 U. S., 458, 465-66; The Valentia, 165 U. S., 267; Woolsensak vs. Reiher, 115 U. S., 96, 99; Ives vs. Sargent, 119 U. S., 652, 661; Angle vs. N. W. M. L. Ins. Co., 92 U. S., 330, 342.)

> "It is a rule of universal application in all cases of fraud on the part of the debtor, or seller

> of property, that notice of facts sufficient to put a party upon inquiry, amounts, in judgment of law, to notice, and is sufficient to charge the purchaser with knowledge of the matters and things it is reasonable to suppose such inquiry or investigation would have developed. *Inquiry on the part of the purchaser* having such notice becomes a *duty*, and *diligence an act of justice.*"
>
> Hamlin vs. Pettibone, 6 Biss., 167; s. c., 11 Fed Cas. No. 5995, pages 373, 375.

Schleier, therefore, must be presumed to have known:

(1) That the National Bank had been the depository and debtor of the Savings Bank and its small savings depositors ever since the National Bank commenced business—August 1, 1889—and long prior to the execution of his lease.

(2) That ever since the closing of the National Bank, July 19, 1893, until about November, 1896, the National Bank admitted it was the debtor of the Savings Bank and its depositors, and that only because of its repudiation of this liability did it become necessary for assignee Spencer to bring suit. (Record, page 37, folio 54, section "16b.")

(3) That July 2, 1897, the National Bank agreed with assignee Spencer that if he would "refrain from taking any further steps in said suit until January 1, 1898, without prejudice by reason of such delay," the National Bank agreed that it would "take no further action whatsoever to the prejudice of" assignee Spencer "in the above named suit, or any further action whatsoever for the surrender of its charter or the disposal of its property to the prejudice

of" said plaintiff assignee Spencer. (Record, pages 38-9, folio 56.)

Therefore, Schleier, by his transaction of October 30, 1897, in seeking to acquire title to the National Bank's assets, the Bank building, in face of the contract aforesaid between assignee Spencer and the National Bank, that the Bank would not then dispose of its property—the building—makes him, Schleier, a *lis pendens*, and therefore a *mala fide* purchaser. (Owens vs. Meyers, 3 Bibb, 278; Kellar vs. Stanley, 86 Ky., 240; s. c., 5 S. W., 477, 480.)

(4) Schleier, from his knowledge of the suit, must also be presumed to have known that the National Bank had been for some time prior to said July 1, 1897, in course of voluntary liquidation.

> "After a vote of the directors to close their bank and go into liquidation, any transfer of the assets of the bank to a creditor, whereby that creditor secures a preference, will be presumed to be made with a fraudulent intent."
>
> Bank vs. Price, 22 Fed., 697.

(5) Schleier's demurrer also admitted that the Bank was, and had been, insolvent for years.

It is fair to assume that the Bank made itself insolvent by putting its entire capital into the Bank building.

Ever since the Bank closed, July 19, 1893, it was insolvent through its inability to discharge its debts in the due course of business. (Irons vs. Bank, 6 Biss., 306.)

The Bank's failure to pay Schleier his rent under the lease, for the three months prior to October 30,

1897, was of itself sufficient notice to Schleier of the Bank's insolvency.

Section 5242 of the United States Revised Statutes makes void all transfers by a national bank after an "act of insolvency," or in contemplation thereof.

> "It is sufficient, under section 5242 of the Revised Statutes, to invalidate such a transfer, that it is made in contemplation of insolvency, and either with a view to prevent the application of the assets of the bank in the manner prescribed by chapter IV of title 62 of the Revised Statutes, or with a view to the preference of one creditor to another."
>
> U. S. Bank vs. Butler, 129 U. S., 223, 231.

It seems that it is immaterial whether Schleier actually knew of the Bank's insolvency.

> "It is not necessary, in order to invalidate a transfer, that the party to whom it is made knows of or contemplates the insolvency of the bank which makes the transfer."
>
> Case vs. Citizens' Bank, 2 Woods, 23.
>
> Roberts, Recvr., vs. Hill, Admr., 24 Fed., 571, 574.

Schleier was bound to know that, either because of, or, in contemplation of insolvency, the National Bank was, by law, required to make a just and equal distribution of its assets among all unsecured creditors, and that preferences were prohibited and unlawful. (Davis vs. Bank, 161 U. S., 275, 284; Scott vs. Armstrong, 146 U. S., 499, 510; Bank vs. Price, 22 Fed., 697; U. S. R. S., section 5242.)

> "A statute like section 5242, to secure to the bank's creditors an equal distribution of its assets, partakes of the character of a bankrupt law. Any act done with a view of defeating this object is a fraud upon the act, and is illegal."
>
> Hahn vs. Salmon, 22 Fed., 801, 810-11; s. c., 10 Sawyer, C. Ct., 198.

Sections 5242, 5236, and other provisions of the national banking act, are a part of the substantive charter contract which enters into every contract between the national bank and its creditors. The act furnishes a cumulative statutory remedy for all creditors. (Wright vs. National Bank, 1 Flip. C. Ct., 568; s. c., 30 Fed. Cas., 679, case No. 18,084; Irons vs. National Bank, 6 Biss., 301; s. c., 13 Fed. Cas., 100, case No. 7,068; s. c., 120 U. S., 27.)

So far as Schleier's dealings were in violation of the Bank's charter contract, preventing preferences and preserving equality among its unsecured creditors, he can not claim to be an innocent purchaser. (Baily vs. Citizens' Gas Light Co., 27 N. J. Eq., 196.)

3. Schleier's demurrer admits that he coerced the Bank to convey him the building and surrender the lease by threats of holding the Bank and its stockholders liable upon the *personal* covenant of the Bank to pay the rent for the ninety-one remaining years of the lease.

Schleier's deeds from the Bank state one of the considerations to be such release from liability from all future rent.

4. Schleier's demurrer admits that the statement made at the time of the stockholders' meeting, likewise contained in the notice thereof, that the fixed

charges exceeded the income of the building, was a false statement.

5. If the opinion of the learned appellate court be accepted as correct, on the point that the *personal* covenant of the Bank to pay rent imposed no future liability after the Bank ceased to occupy the premises —then Schleier not only received (a) full payment of his rent during the years the Bank was insolvent (1893-7), excepting only the last three months—and (b) took a $305,000 building to satisfy less than a $6,000 debt.

> "Giving a preferred creditor more than debt is reasonably worth is fraudulent." (Klein vs. Hoffheimer, 132 U. S., 367, 378.)
>
> "If the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property or the party interested in it has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold.
>
> "Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale, to raise the presumption of fraud."
>
> Graffam vs. Burgess, 117 U. S., 180, 192.
>
> Schroeder vs. Young, 161 U. S., 334, 378.
>
> Byers vs. Singer, 19 How., 303, 311.

"To require a rescission, the consideration must be grossly inadequate. * * * The consideration must be *so inadequate* as to strike the mind *at first blush* as far below the actual value

of the property, and to clearly *indicate* the existence of *some unfair* dealing, some *fraud, imposition* or *oppression* by the purchaser."

Jenkins, Assignee, vs. Ernstein, 3 Biss., 128, 136-7.

Osgood vs. Franklin, 3 Johnson's Ch., 323.

"A conveyance of land worth $2,000, in consideration of a payment of $100, is constructively fraudulent against creditors."

Scoggin vs. Schloath, 15 Oregon, 380.

"A transfer by a debtor in failing circumstances, even for a valuable consideration, if it lacks the element of good faith, is fraudulent and void as against creditors."

Lukins vs. Aird, 6 Wall., 78, 79.

In this case there were the following elements of fraud:

(a) The stockholders of the Bank relieved themselves from further liability on the *"personal"* covenant of the Bank for rent for the balance of the term. The shareholders' liability was an asset. The Bank's capital—$305,000.00, the building—was an asset. By this shifty transaction, two assets were wiped out at one fell swoop.

(b) Schleier threatened to hold the stockholders liable for this rent, unless they accepted to his proposition.

"Deeds of land made by *grantor* when *deeply in debt* and when *suits* were *pending* against him,

and the *consideration* money one-*half* only of the *actual value*, are a fraud."

Hudgins vs. Kemp, 20 How., 45, 52-3.

"A sale by a debtor to a creditor of property of *value* largely in *excess of* the *debt* due from one to the other, is prima facie fraudulent, when *made under an impending seizure* of the same property by another creditor."

Worrell vs. Vickers, 30 La. An., No. 1, 202.

See cases in 10 A. and E. Enc. L., 331, paragraph IV, n. 2.

(c) The suit of assignee Spencer for a large amount (over $1,000,000), in which the judgment of $475,800 was pending.

(d) The Bank had agreed, when the suit was commenced, that it would take no steps to dispose of its property, pending the disposition of Spencer's suit, and Schleier knew of the pendency of this suit, and also of the Bank's agreement not to dispose of the building.

(e) It was averred that the income from the Bank building was making it a losing proposition. when, as a matter of fact, it was not a losing proposition.

(f) Schleier had been getting his rent all the time since the insolvency of the Bank in 1893, at the rate of $13,000 a year, while the Bank, first admitting, and then subsequently contesting, the indebtedness to assignee Spencer, the Savings Bank and its 5,000 small depositors.

The circumstances are certainly sufficient to show that Schleier was anything but an innocent pur-

chaser for value without notice. The taking of the Bank's $305,000 capital—the building—in satisfaction of less than a $6,000 debt, leaving the small depositors of the Savings Bank with their $475,000 judgment unsatisfied, is certainly such a gross disparity between consideration and value, and is done under such circumstances, as to shock the moral sense and provoke the righteous indignation of any court of equity.

In the present state of the pleadings, the burden is on Schleier to make the defense of innocent purchaser.

> In the first instance, "the burden is upon the attacking creditor, but where the fraudulent intent on the grantor's part is made out, and the circumstances are suspicious, the purchaser must show that he has paid value, and if he does, it must then appear that the purchaser had notice of the fraud."
>
> Crawford vs. Neal, 144 U. S., 585, 595.

"In the testimony of Klein himself, it was made very clear that he was aware, at the time of the transaction by which he obtained their choses in action, that Strauss and Levy were insolvent, or, at least, in failing circumstances, and unable to pay their debts; and that he received from them all, or nearly all, of the notes and accounts due them, and professed to take them in payment of the debt of his firm.

"It was not unreasonable, therefore, that the court should charge that, under these circumstances, Klein and his partners should establish the fairness of the proceeding by which they came into possession of these notes and accounts. * * * The insolvency of Strauss & Levy were

known, or at least might have been known, to Klein, and, therefore, when he undertook to deal with the assets of this insolvent firm by taking a very large part of them in payment of his own debt, a circumstance which he knew must leave a large number of other creditors unprotected, or without means for payment, it was proper that all his dealings in that matter should be fair and honest; that his claim should be a just one, and that he should receive no more than what was reasonably necessary to pay his debt; and that if the transaction was tainted with any fraud or unjust interference with the rights of creditors, it should not stand."

Klein vs. Hoffheimer, 132 U. S., 367, 377-8.

First National Bank vs. Swan, ...Wyo., ——; s. c., 23 Pac., 743, 750-1.

"But to avoid the settlement, insolvency need not be shown nor presumed."

Parish vs. Murphree, 13 How., 92, 100.

Weeks vs. Hill, 88 Me., 113; s. c., 33 Atl., 778.

Pratt vs. Curtis, 2 Lowell, C. Ct., 87; s. c., 19 Fed. Cas., 1,251, Case No. 11,375.

Sedgwick vs. Place, 12 Blatch., 163; s. c., 21 Fed. Cas., 992, Case No. 12,621.

"A voluntary deed is fraudulent by operation of law where the facts and circumstances clearly show that existing creditors are thereby prejudiced without regard to whether there was an actual or moral fraud in the conveyance."

Thompson vs. Crane, 73 Fed., 327, 330.

"The general manager of a corporation, though given by its by-laws the entire charge of its business and affairs, subject to the approval of its board of directors, has no power, after he knows the corporation to be insolvent and about to be placed in the hands of a receiver, to transfer the bulk of its property to one of its creditors in payment of a pre-existing debt; and such a transfer, not authorized nor ratified by the directors, is void as to its other creditors."

Hadden vs. Dooley, 92 Fed., 274, 279; s. c., 35 C. Ct. Apl., 554.

"A bill in equity by an assignee in bankruptcy, which charged that a debtor made a conveyance for the benefit of his wife and children at a time when he was much embarrassed, and that some of the creditors at the date of the deed were still creditors at the date of the bankruptcy, was held good on demurrer, though it did not charge that the debtor was insolvent when he made the deed."

Pratt vs. Curtis, 2 Lowell, 87; s. c., 19 Fed. Cas., 1,251, Case No. 11,375.

Of the latter case this court has said:

"In the case of Pratt vs. Curtis, 2 Lowell, 87, * * * Each bill alleged that at the time of the settlement the bankrupt was indebted to persons who were still his creditors, and was embarrassed in his circumstances and that the deed was made with intent to delay and defraud his creditors.

"The demurrer to the bill was sustained on the view that the assignee in bankruptcy, and he

only, had the right to impeach the deeds in the interest of creditors."

Warren vs. Moody, 122 U. S., 132, 138.
Adams vs. Collier, 122 U. S., 382, 391.

Schleier, not being an innocent purchaser of the building for value, without notice, can not, by his conveyance and possession acquired on October 30, 1897, prevent this appellant receiver from following, recovering and reconverting into cash assets the $305,000 capital and moneys of the bank, in the form of the building.

VII.

THE TRANSACTION COMPLAINED OF,

The Bank's loss of its assets, the $305,000 building, to creditor landlord Schleier, on October 30, 1897,

WAS NOT AN EXECUTED TRANSACTION, VESTING TITLE TO THE BUILDING IN SCHLEIER, EITHER,

(1) When the lease was executed, September 12, 1889, or

(2) When the building was completed in January, 1891.

THE BANK ACT MADE THE BUILDING A TRADE FIXTURE, REMOVABLE AT ANY TIME BEFORE THE LEASE ENDED.

THE BANK'S ACTUAL POSSESSION OF THE BUILDING, UNTIL OCTOBER 30, 1897, IMPRESSED A CONTINUOUS EXECUTORY STATUS ON ITS TITLE, SO FAR AS CONCERNS SCHLEIER'S CLAIM THERETO.

SCHLEIER'S TITLE DEEDS, OF OCTOBER 30, 1897, ESTOP HIM FROM CLAIMING OTHERWISE.

The opinion says that

"when the conveyance (the lease) is made and the *funds* of the Bank have been *invested therein*, the estate so acquired becomes *an asset of the Bank*." (Record, 111, lines 6-8.)

As a transfer of title, the lease could only become executed when *nothing remained to be done* by either

the Bank or Schleier, and the transaction *had been* fully completed, or *was completed at the time* the lease was made. (McNett vs. Cooper, 13 Fed., 586.)

A contract "*executed*" differs in nothing from a grant, which, in its own nature, amounts to (a) *an extinguishment* of the right of the grantor, and (b) implies a contract not to reassert that right. (Fletcher vs. Peck, 6 Cranch, 87; 7 Myers' Fed. Dec., sections 1805, 1808.)

But, so far as this lease is analogous to a conveyance, it is simply *the conveyance* of landlord Schleier *to* the tenant Bank of the right to possession.

In no sense can this lease, either *at* the *date* of its execution, *or thereafter on the completion* of the building, be *a then* operative *conveyance* of the building by the *Bank to Schleier.*

For, to constitute a title in Schleier to the Bank building, there must have been contemporaneously united in him, (1) the *actual* possession; (2) the *right* of possession, and (3) the *right* of property. (4 Kent's Com. (12th Ed.), *373; Shelton vs. Alcox, 11 Conn., 249; 2 Blackstone's Com. (Cooley's Ed.), 195.)

He must have had both the *jus ad rem* and the *jus in re.* (1 Kent's Com. (12th Ed.), *177.)

Mr. Schleier had, and made no claim to possessing, either of these elements of title until the Bank's deeds to him, October 30, 1897.

Therefore, landlord Schleier's lease to the Bank was in no respect entitled to be viewed as a conveyance of its building, by the Bank to Schleier, either when the lease was executed, September 12, 1889, or later, when the building was completed, in January, 1891.

So long, then, on and after the execution of the lease, as the Bank retained the actual possession of its $305,000, or the building which it built with that money, any of the Bank's covenants in the lease, purporting to agree to give the building to Schleier, were *wholly executory.*

By the bank act the building was a movable trade fixture. The Bank's covenants departed from the act and common law, in,

a. That the *building* should *not* be *removable;* and,

b. The building should be surrendered to Schleier at the end of the ninety-nine-year lease.

All statutes must be read in the light of germane principles of the common law.

The substantive charter contract between the people and the Bank was, that the Bank should keep its capital and moneys "flowing in the daily channels of commerce." (Bank vs. Mathews, 98 U. S., 621.)

In so doing, the Bank's business *must*—a *mandatory* requirement—*be* transacted at "an office or banking house." (Section 5190.)

Incidentally, as an aid to the banking, *not to the real* estate business, for this sole purpose, and "for no other," the Bank was empowered to "acquire by purchase such real estate as shall be necessary for its immediate accommodation in the transaction of its business." (Section 5137.)

The sole test which determines whether the Bank building was a removable trade fixture is, "whether it is designed for purposes of trade." Neither its size, form, nor the materials of its foundations enter into the question. (Van Ness vs. Pacard, 2 Pet., 146.)

By the Bank's primary, substantive charter contract with the people, and with these creditors, its capital and moneys were trade assets, wherewith to conduct the national banking business.

Unless the Bank alone possessed the power to change its charter contract, its diversion of its entire capital from the banking business into the unlawful form of the Bank building, for a banking office, such capital still retained its statutory character of a trade asset.

As such capital it was impressed with the mandatory, non-avoidable public duty of use in the conduct of the business of a solvent national bank.

Concerning landlord creditor Schleier's title to the Bank building, his lease required:

> "Within eighteen (18) months from February first, 1890, at their own (the Bank's) cost and expense, to build, erect and complete a good, substantial building, *not less than* four stories in height, to cost *not less than* one hundred thousand dollars ($100,000)." (Lease, Record, page 7, folio 9; pages 54-5, folio 80.)
>
> "That said building and improvements erected or made upon said premises shall at once become a part of the realty, without any right on the part of any one whomsoever to remove the same." (Record, page 7, folio 10.)
>
> "That at the expiration of said 99 years, etc., they—the Bank—will peaceably and quietly leave, surrender and yield up to 'Schleier,' his heirs and assigns, the said demised premises, together with any and all buildings and improvements erected and made thereon." (Record, page 7, folio 10.)

Excepting the Bank's covenants (1) against removing the building, and (2) for its surrender at the end of the ninety-nine-year term, the lease was simply declaratory of the common law.

> "By the common law, a leasehold interest in land is personal property. Trade fixtures put up by the lessee, although real estate as between the lessor and himself, while annexed to the land, *yet may, during the term of the lease, be severed by the lessee*, or by one deriving title from him, and thus reconverted to their original condition of chattels. At *any time before the expiration of the term*, therefore, both the leasehold and the *fixtures may be taken on execution against the lessee*, like other personal property."
>
> Freeman vs. Dawson, 110 U. S., 264, 270.
>
> Wiggins Ferry Co. vs. O. & M. Ry., 142 U. S., 396, 415-16.

Therefore, even if these covenants were binding on the Bank—which is denied—Schleier's title to the building was executory until he gained lawful possession thereof, at the end of the lease.

If, then, the Bank's covenants and disposition of its $305,000 capital put into the building is unlawful; that is, as the opinion says, *ultra vires*, then the lease will simply be efficient to show that the Bank was not a trespasser, but built the building on the land with Schleier's consent. Not, however, with the lawful intention of parting with the title thereto. In that event the case will be analogous to the following case decided by this court, and the Bank or this appellant receiver is entitled to recover:

"The argument is that the moment the school house was completed it belonged to the owner of the land by operation of law, and therefore that he was entitled to be recompensed for it upon condemnation. The maxim *quic quid plantatur solo, solo cedit*, is not of universal application. Structures for the purposes of trade or manufacture, and not intended to become irrevocably part of the realty, are not within the rule (Van Ness vs. Pacard, 2 Pet., 137); nor is it applicable where they are erected under agreement or by consent, the presumption not arising that the builder intended to transfer his own improvements to the owner. And courts of equity, in accord with the principles of the civil law, when their aid is sought by the real owner, compel him to make allowance for permanent improvements made *bona fide* by a party lawfully in possession under a defective title."

Searl vs. School Dist., Lake Co., 133 U. S., 553, 561.

Not until Schleier unlawfully gained possession by the illegal transaction of October 30, 1897, did his claim of title take an executed form.

The form in which appellant receiver finds the assets of the Bank is immaterial, provided they are not in the hands of an innocent purchaser for value, without notice.

The fact that the Bank's $305,000 capital and money has been changed into the form of the Bank building in no manner prejudices either the comptroller's or his appellant receiver's right either to recover or reconvert the same into cash assets, for the following reasons:

1. His equitable right to follow misapplied money or other property of the Bank into Schleier's hands does not depend upon either (a) the ability to identify it, or (b) attach only to the very property misapplied, or (c) the proceeds of the property procured in place of it, (d) nor does confusion destroy the equity entirely, but converts it into a charge upon the entire mass. (Peters vs. Bain, 133 U. S., 670, 693.)

2. At his instance a court of equity has jurisdiction to reach the property of the Bank, in the hands of the original wrongdoer, creditor landlord Schleier, or in the hands of any subsequent holder, until a purchaser of it in good faith, and without notice, acquires a higher right. (Moore vs. Crawford, 130 U. S., 122, 128.)

If it is claimed that creditor landlord Schleier was not an original wrongdoer, then he is certainly not an innocent purchaser of the Bank building, for value, without notice, as we have shown.

3. When the Bank was a going concern, at any time after five years after the Bank's money went into the building (after 1895), the comptroller could have compelled the Bank to reconvert the building into a money asset, for—

a. The comptroller, under the general direction of the secretary of the treasury, was and is charged with the execution of all the laws governing national banks. (Section 324.)

In effect, he is the *alter ego* of the United States.

b. The spirit and intent of the bank act prohibits a bank from holding title to realty, not needed "for its immediate accommodation in the transaction of its business, for a longer period than five years." (Section 5137.)

c. No portion of the capital could be withdrawn in the form of dividends or otherwise. (Section 5204.)

d. The comptroller could compel the restoration of the Bank's capital, and on its failure therein, put the Bank into liquidation. (Section 5205.)

4. When liquidating a bank, the appellant receiver can, under the direction of the comptroller, upon the order of a court of record of competent jurisdiction, reconvert the bank's property into money assets. (Section 5234.)

The non-expiration of the five years given to banks within which to reconvert real estate into cash assets, together with the then existing panic, perhaps explains why the comptroller only assessed this Bank's shareholders, when it failed in July, 1893, instead of ordering it to then get its capital out of the Bank building.

The consequences flowing from Bank's possession of building as an asset until transaction of October 30, 1897, were:

1. Schleier's claim of title thereto, under the lease or otherwise, was *wholly executory.*

The opinion says: "The act ('wrongful expenditure' of Bank's $305,000, under Bank's covenants) complained of was not *malum in se*, but, at most, was simply *ultra vires.*" (Record, page 109, lines 32-34.)

This honorable court has said:

> "A party to a contract, the making of which, although prohibited by law, is not *malum in se*, may, *while it remains executory*, rescind it and recover money by him advanced thereon to the other party who had performed no part thereof."
>
> Spring Company vs. Knowlton, 103 U. S. Rep., 57, 60.

The appellant seeks *no accounting* or recovery of *past rents already paid* to Schleier, the consideration for past occupation of the premises.

The charter duty impressed by the bank act, upon the Bank's $305,000 capital, was a continuing, non-avoidable duty to the public, which is analogous to the public duty incumbent upon railroads, which they may not by contract abandon.

The action looks wholly to *longer* avoiding a continuing breach of its charter contract as a national bank in the future, for the remainder of the lease. It seeks the restoration of such capital to the performance of the public duties, and subjection to the liability imposed by the lawful conduct of a national bank, under the bank act. It is analogous to the following cases of the unexpired term of railroad leases.

Thus, where a twenty-year lease was made, and the lessors resumed possession at the end of five years, the accounts for that period being adjusted, a condition in the lease to pay the value of the unexpired term is void, the case not coming within the principle of executed contracts, originally ultra vires. (Thomas vs. Railroad Company, 101 U. S., 71, 86-7; Panco vs. St. L. & A. Rd., 118 U. S., 290, 316-17.)

"A court of equity, upon a bill filed by a corporation, will rescind a contract still executory, into which it has entered, where the same is ultra vires and against public policy, although *all the stockholders* may have either *expressly assented* thereto or acquiesced for a season therein, *and in its partial execution* by the other party."

New Castle Northern Ry. Co. vs. Simpson, 21 Fed., 533.

The suggestions of the learned appellate court, "while the matter was *in fieri*, no stockholder or other person authorized to complain, nor the United States," took "any steps to arrest the unauthorized expenditure" (Record, page 109, lines 27-32), are without force, because:

(1) In this country bank corporate franchises are creatures of *express legislative* act. (Bank vs. Dandridge, 12 Wheat., 6468; Bank vs. Earl, 13 Pet., 579.)

(2) In this case the pleadings reveal *no legislative* knowledge, but *only* notice or *knowledge* by *executive* and *administrative* officials, namely, by the comptroller and his officials.

The basis and measure of all executive power is the *warrant of law*, statutory and common.

The executive department in every instance *must show authority of law* for its action. (Cooley's Const. Lim. (6th Ed.), 435.)

Therefore, no act of delay or omission by the executive official, the comptroller or of any of his subordinates, can in the slightest degree modify or extend this National Bank's corporate franchises.

The demurrer was *general*, and was sustained for *want of equity*, and we will not stop to consider whether *laches* comes under the head of *want of equity*, for,—

> "One who is in continuous and peaceable possession of property may wait until his title and possession are attacked before setting up equitable demand, without being chargeable with laches."
>
> Ruckman vs. Cory, 129 U. S., 387, 390.
>
> Simmons Creek C. Co. vs. Doran, 142 U. S., 417, 442, 448-9.
>
> Buchannon vs. Upshaw, 1 How., 56, 84.
>
> Massenberg vs. Denison, 71 Fed., 618, 625.

The Bank's actual possession preserved the right to rescind the *ultra vires* act of the wrongful expenditure of its $305,000.00 capital in the building.

> "A corporation issuing illegal and ultra vires bonds and mortgage not guilty of laches, which would defeat its right to impeach same *where its possession* of the property is *uninterfered with* until commencement of suit to foreclose."
>
> Gunnison Gas & Water Co. vs. Whittaker, 91 Fed., 191.

No amount of delay in so doing could in the least degree prejudice the right to rescind, while the Bank had actual possession.

> "Laches is not, like limitation, a mere matter of time, but principally a question of the *inequity of permitting the claim* to be enforced —

an inequity *founded upon some change* in the condition or relations of the property or parties."

Galliher vs. Cadwell, 145 U. S., 368, 373.

On the contrary, the lapse of time during the Bank's possession, operates rather advantageously than as a bar. (May's Heirs vs. Fenton, 8 J. J. Marsh, 306, 309.)

2. Therefore, the government, the comptroller, the Bank, for itself or as representing these its then creditors, had the right at any time during such possession, to take any action deemed proper, for a rescission of the lease with Schleier, and the recovery of its $305,000.00 capital and money.

3. The recording of the lease was without avail for any purpose, because,

a. Actual possession outranks constructive notice by record title, since such possession is always notice of all equities and claims of the possessor, and always puts those intending to deal with the record title (appellant receiver and these creditors were *not so dealing*) upon inquiry.

"Actual possession is continual claim of the highest and most notorious character. Possession is the end and aim of real actions. It is the most specific assertion and pursuit of right which a claimant himself can make.

"Possession under a claim of right is an assertion of that claim and an acting on it every day, month and year, during the continuance of such possession. It is an assertion of claim, be that legal or equitable, with notice to all adversary claimants. It is a notice of claim, from which the adversary can not escape by alleging

ignorance of the fact. Law and equity bind him to know it, and to notice it at his peril. * * *

"Possession is favored in law. Possession of things, personal or real, ripens by length of time into a perfect and indefeasible title.

"The lowest and most imperfect claim to land by mere naked possession or actual occupation, without any shadow or pretense of right, may ripen, by continuance, into an apparent right of possession; next into an actual right of possession, and, lastly, into a complete title, comprehending the jus duplicatum droit droit, or the double right of seizin and right of possession combined.

"In equity, length of possession is equally favored and protected."

Barbour vs. Whitlock, 4 T. B. Mon., 180, 193-4.

b. If, as at common law, the lease was only a chattel real and not real estate, then the Colorado recording law would have no application, and the record of the lease no force. (Burck vs. Taylor, 152 U. S., 653-4.)

c. If it was real estate, still the recording acts had no application, because,

Neither the government, the comptroller, nor the Bank's creditors, the depositors of the People's Savings Bank, were dealing with the record title to the land in doing business with the Bank.

The Colorado courts of last resort decide (a statutory rule of property this court has declared itself bound to follow), as the language reads, that the act does not bind others than those *dealing with the record title*, as *subsequent* purchasers, etc. Mills' Stats.,

593, section 446; Rose vs. Dunklee, 12 Colo. Apl., 403, 414.)

d. By the bank act, the government, the comptroller and the Bank's creditors obtain, and are entitled to obtain, their information of the Bank's assets and condition, from,

(1) The required statutory sworn reports of the bank officials, made five times each year to the comptroller, published in the Denver newspapers. (U. S. Stats., section 5211; Ball, page 211.)

(2) The frequent and unexpected examinations of the Bank's books and affairs, by the government agents, the bank examiners, reported to the comptroller. (U. S. Stats., section 5240; Ball, pages 238-239.)

The bank act neither contemplates nor requires that either the government, the comptroller or its creditors shall examine or take notice of the record titles of real estate, to be fully informed about the financial condition or business affairs of a national bank.

The Bank's possession of the building, under the circumstances, gave the Bank a credit,—

(a) With the government, the comptroller, and

(b) With these creditors, its depositors, not to be gainsaid by Schleier,

Entitling their appellant receiver to complain, upon demands prior and paramount to Schleier's executory claim of title to the building.

Such possession preserved the Savings Bank's right to sue from August 1, 1889, to day suit was commenced, resulting in $475,825.71 judgment.

If the bank had parted with, instead of duly retained, the actual possession of the building, it would, to that extent, have impaired its credit, and warned the government, the comptroller, and its creditors, the People's Savings Bank depositors, not to trust it too far. (Sexton vs. Wheaton, 8 Wheat., 229, 250-1.)

It is the Bank's actual possession of the building which gave it a real or false credit status with the government, the comptroller, and its creditors, the People's Savings Bank depositors, which entitles them to complain of the Bank's *ultra vires* disposition of the building to Schleier. (Graham vs. R. R. Co., 150 U. S., 153.)

a. The appellant's receiver represents Fermor J. Spencer, assignee of the People's Savings Bank.

Fermor J. Spencer, assignee of the People's Savings Bank, represents the Savings Bank, and that Bank represents its several thousand small savings depositors.

b. The relation between the receiving National Bank and its depositors, the Savings Bank and their depositors, was that of debtor and creditor. (Bank of Republic vs. Millard, 10 Wall., 152, 155-6; Thompson vs. Riggs, 5 Wall., 663, 678; Marine Bank vs. Fulton Bank, 2 Wall., 252, 256-8; Bank of Ky. vs. Wister, 2 Pet., 325; Hardy vs. Chesapeake Bank, 51 Md., 562; s. c., 34 Am. R., 325, 328; Ward vs. Johnson, 5 Ill. App., 30; Davis vs. Smith, 29 Minn., 201; Aetna National Bank vs. Fourth National Bank, 46 N. Y., 82; Dabney Bank of State of S. Carolina, 3 S. Car., 124.)

c. The Savings Bank and its small depositors were creditors of the National Bank, entitled to com-

plain from the time of the National Bank's organization, August 1, 1889, down to the present time.

For (1) *The judgment* for $475,825.71, rendered November 20, 1889, against the National Bank, in favor of Spencer, as assignee of the Savings Bank, in suit commenced June 26, 1897, represents *the balance* found *due* from the National Bank to *the People's Savings* Bank and its depositors covering the period of time from the organization of the National Bank, August 1, 1889.

This judgment relates back to the very first day and date (August 1, 1889), when these creditors, the Savings Bank and its small depositors, commenced to make their deposits with the National Bank. The accounts upon which judgments were founded may be looked to for the purpose of showing that the debtor was in debt at the date of the conveyance. (Hinde's Lessee vs. Longworth, 11 Wheat., 199, 211.) Howe vs. Ward, 4 Me., 195:

> "The date when the agreement or obligation came into existence governs the complaining or attacking creditors' rights."
>
> Wood on Fraud, Conv. & Cred. B., section 90.
>
> Thompson vs. Crane, 73 Fed., 327, 331.

From the moment, on August 1, 1889, that the Savings Bank became depositor and creditor of the National Bank, the latter Bank owed to the Savings Bank the duty to satisfy its claim from the corporate funds. (Singer vs. Upton, 91 U. S., 56, 60; Taylor on Corporations, 4 Ed., section 651, 665.)

Successive renewals of the claims of these depositors, although not due at the time of the actual unlawful transaction between Schleier and the National Bank, do not prejudice their right to complain. (McLaughlin vs. Bank of Potomac, 7 How., 220, 228; King vs. Doane, 139 U. S., 172; Preston Natl. Bank vs. Pierson, 112 Mich., 438; s. c., 70 N. W., 1013, 1014, 1015; Lee vs. Hollister, 5 Fed., 752, 757.)

d. This duty owing by the National Bank entitled the Savings Bank to follow and recover the corporate assets of the National Bank until they passed into the hands of an innocent purchaser for value without notice. (Moore vs. Crawford, 130 U. S., 122, 128; Singer vs. Upton, 91 U. S., 56, 60; Curran vs. State, 15 How., 304, 307; Railroad Co. vs. Howard, 7 Wall., 393, 409; Chicago, etc., Ry. Co. vs. Chicago Bank, 134 U. S., 276; Taylor on Corporations (4th Ed.), section 668; Bodley vs. Goodrich, 7 How., 276; Cleveland vs. LaCrosse, 5 Fed. Cas., 1,036; Taylor on Corporations (4th Ed.), section 656; Wood vs. Dummer, 3 Mason, 308; Union Natl. Bank vs. Douglas, 1 McC. Cir. Ct., 86.)

e. Schleier's title to the Bank's $305,000 capital and moneys—the building—was executory, both in form and substance, until the transaction of October 30, 1897. The National Bank was under obligation to pay these Savings Bank's depositors, represented by the appellant receiver, ever since August, 1889. Schleier was not an innocent purchaser without notice. The opinion says: "The act complained of ('the unauthorized expenditure') was not *malum in se*, but was simply *ultra vires*." (Record, page 109, lines 32, 33.)

The opinion further correctly states that appellant receiver "is vested with all the rights of creditors, and may challenge any wrongful act which creditors can challenge." Record, page 109, lines 40-4.)

This court has said that acts not *malum in se*, but simply *ultra vires*, where they are executory, may be rescinded and properly recovered. (Spring Co. vs. Knowlton, 103 U. S., 57, 60.)

Therefore appellant receiver's rights to a recovery, on behalf of the Savings Bank's depositors, of the National Bank's $305,000 capital and moneys—the building—is prior in time, and therefore paramount to Schleier's claim of title to the building.

VIII.

THE NATIONAL BANK'S CHARTER CONTRACT WITH THE SAVINGS BANK WAS,

THAT THE FORMER'S CAPITAL, WITH THE LATTER'S DEPOSITS AND THOSE OF OTHERS, SHOULD,

(a) Not be embarked in realty transactions for the private profit of the former's shareholders, but

(b) Should be generally held in the form of currency and cash items, and,

BE UTILIZED TO PROVIDE A CURRENCY, according to the terms of the bank act, to promote trade and commerce,

SO THAT, AS A SOLVENT, GOING CONCERN, THE NATIONAL BANK COULD,

on the Savings Bank's demand, made in the due course of business,

PAY ITS DEBTS IN FULL IN CURRENT FUNDS.

BY PUTTING ITS $305,000 INTO THE BUILDING, UNDER THE LEASE, THE NATIONAL BANK DISABLED ITSELF FROM KEEPING SAID CONTRACT,

TO THE LOSS BY THE SAVINGS BANK AND ITS DEPOSITORS,

THE UNPAID JUDGMENT OF $475,825.71.

THE NATIONAL BANK'S TRANSFER OF THE $305,000 BUILDING TO SCHLEIER

TO SATISFY HIS $6,000 DEBT,

While the Bank

1. Was insolvent,
2. Was in dissolution.

3. Was being sued by the Savings Bank and depositors,
4. Had agreed, in such suit, not to dispose of the building,

WAS AN ULTRA VIRES DISPOSAL OF ASSETS, IN VIOLATION OF ITS CHARTER CONTRACT WITH SUCH CREDITORS, TO THEIR INJURY, WHICH,

1. Being executory as to vesting title, and
2. Schleier not being an innocent purchaser,

GAVE APPELLANT RECEIVER, REPRESENTING SUCH CREDITORS, THE RIGHT TO FOLLOW AND RECOVER SUCH ASSETS TO SATISFY THEIR $475,825.71 JUDGMENT.

I. The charter of a corporation is a contract. (Dartmouth College vs. Woodward, 4 Wheaton, 518, 624, 636, 637, 643-4, 658.)

The National Bank's substantive corporate charter contract is contained in that general law, The National Bank Act.

Therefore, the subject of *ultra vires* is a branch of the law of contracts, statutory in form.

II. The *charter* of a national bank is *a contract*,

(a) *Primarily*, between the United States and the incorporating and successive stockholders of the bank. (Dartmouth College vs. Woodward, 4 Wheaton, 518, 643-4; B. & L. Rd. Co. vs. S. L. Rd. Co., 2 Gray, 1, 29; State vs. Noyes, 47 Me., 189, 205; West River Bridge Co. vs. Dix, 6 Howard, 507, 532; s. c., 7 Myers Fed. Dec., 451, section 2189; Brewer, J., in C. R. I. & P. Co. vs. U. P. Co., 47 Fed., 15.)

(b) *Secondarily*, a contract which enters into every contract between such national bank and every one who deals with it.

"All persons dealing with these institutions can only acquire and enforce rights against them, under the limitations there designated." (Bank vs. Colby, 21 Wall., 609, 612.)

For, every one who deals with a national bank is bound to know the general statutes, the national bank act, i. e., the national bank's charter contract, and, as a law abiding citizen, is equally bound with the bank to observe such general law the bank's charter. (West River Bridge Co. vs. Dix, 6 Howard, 507, 532; s. c., and Myers Fed. Dec., 451, section 2189; People vs. Security L. F. Ins. & Anty. Co., 78 N. Y., 114, 125.)

It is to compel business corporations to observe their charter contracts to the state, to their creditors and their stockholders, that their acts beyond the powers conferred by its charter are held void as *ultra vires*. (The Railway Cos. vs. Keokuk Bridge Co., 131 U. S., 371, 384; Central Trans. Co. vs. Pullman Car Co., 139 U. S., 24, 48; Cala. Bank vs. Kennedy, 167 U. S., 362, 368; Concord First National Bank vs. Hawkins, 174 U. S., 364, 370-1.)

The following terms entered into the charter contract of the National Bank with the Savings Bank and its depositors, here represented by this appellant receiver:

1. The People's National Bank was a quasi public corporation, not created to subserve the mere private interests of its stockholders, but a government instrumentality,

created for the public purpose of promoting trade and commerce by furnishing a national currency.

(1) A national bank may be a bank of discount, deposit and circulation. (Oulton vs. Savings Institution, 17 Wallace, 109, 118-19.)

(2) They are quasi public institutions. (Knickerbocker Life Ins. Co. vs. Pendleton, 115 U. S., 339, 344; Foll's Appeal, 91 Penn. St., 434, 437.)

That is, they are instrumentalities of the federal government, created for a public purpose. (Davis vs. Savings Bank, 161 U. S., 275, 283; McClellan vs. Chipman, 164 U. S., 347, 357.)

(3) They are not created to subserve the mere private interests of their stockholders. (Bank vs. Lanier, 11 Wallace, 369, 374.)

(4) They are federal government instrumentalities, created for the public purpose of furnishing a national currency. (National Bank vs. Colby, 21 Wallace, 609, 612; F. & N. M. Bank vs. Dearing, 91 U. S., 29, 33-4; s. c., 3 Myers Fed. Dec., 298.)

Currency is essential to that exchange of goods, productions or property of every kind called commerce.

The federal government is vested with the powers of regulating commerce and also to coin money, regulate the value thereof and of foreign coin. These grants impose the mandatory public governmental duty of providing a currency, to facilitate the exercise of the natural right of contract of its citizens in their dealings with each other, and the performance and maintenance of government, federal and state.

2. The entire charter contract of The People's National Bank with the Savings Bank and its depositors, comprising both its substantive banking and the incidental, subordinate and secondary powers, is the creature of that express public statute, the national bank act, which is to read in the light of any general laws applicable.

Both the primary, substantive banking powers and the incidental secondary powers considered as inseparably incident, at common law, to every created corporation (1 Bl. Com. (Cooley's Ed.), 175-6), are the *creatures of express* grant in the national bank act.

That act is considered as "constituting by itself *a complete* system for the establishment and government of national banks. Everything is fully provided for as in *a separate code* by itself." (Cook Co. Natl. Bank vs. U. S., 107 U. S., 445, 448; Natl. Bank vs. Colby, 21 Wall., 609, 612.)

National banks being chartered under *a general law*, the rule of *strict* construction to keep the banks within their charter contract, and advance them as remedial public instrumentalities in furnishing currency to promote trade and commerce, *applies with still greater* force. (Oregon Ry. Co. vs. Oregonian Ry. Co., 130 U. S., 1, 26-7; N. O. Natl. Bank vs. Wiltz, 10 Fed., 330, 332.)

Therefore, the construction of the charter contract between the National Bank and these creditors depends upon the true construction of the statute, the bank act. (Bullard vs. Clark, 18 Wall., 589; s. c., 3 Myer's Fed. Decs., 220; Bank vs. Dandridge, 12 Wheat., 64, 68; Bank vs. Earl, 13 Pet., 579.)

3. The following general principles, applicable to corporate charters, serve to interpret the charter contract in question:

a. The contract power of this National Bank, like that of every corporation, was, in a way, the converse or antithesis of the contract power of a natural person.

> "The distinction between natural persons and corporations is, that the *former* may *make any* contract *not prohibited* by law or against public policy, the *latter* can exercise *no powers not expressly conferred* on them *by* their *charters.*" (Reese on Ultra Vires, 8, section 5; Mathews vs. Skinner, 62 Mo., 331; Abbey vs. Billups, 35 Miss., 618, 630-1.)

b. The contract power of this National Bank was like that of every financial corporation whose entire powers are the subject of an *express* grant.

Such charter contract power was confined by prohibitions as absolute, to the limits of such affirmative grants of its charter powers, describing the general business and the mode of conducting, as if such corporate grant had been accompanied by express terms of absolute prohibition.

For,

> "(1) An affirmative grant of power in many cases will imply *an exclusion of all others.*" (1 Story on Const., section 448.)
>
> "In this case *a negative* or *exclusive* sense must be given to them, *or they have no* operation at all." (Marbery vs. Madison, 1 Cranch, 137, 174.)
>
> "(2) The charter of a corporation is the measure of its powers, and the *enumeration* of its powers *implies the exclusion of all others.*" (Thomas vs. W. J. Rd. Co., 101 U. S., 71; s. c.,

10 C. L. J., 306; Case vs. Kelly, 133 U. S., 21, 26-7.)

"The *powers of national* banking associations is to be *measured* by the act of Congress." (Bullard vs. Clark, 18 Wall., 589; s. c., 3 Myer's Fed. Decs., 220.)

"(3) Dealing in stocks by a national bank is *not expressly* prohibited. *But such a prohibition is implied from a failure to grant the power.*" (First Natl. Bank vs. Exchange Bank, 92 U. S., 122, 128.)

"(4) When *one mode of exercising* an *express* power by a banking corporation *is prescribed* in the law creating such corporation, by implication, this will seem to *forbid* the *exercise* of such power *in any other way.*" (Fridley vs. Bowen, 87 Ill., 151.)

The affirmative grants of corporate power accomplish, and, in law, serve the purpose of expressing correlative prohibitions, avoiding all corporate transactions beyond the limits of such affirmative grants.

4. This appellee National Bank, like all others, engaged under the bank act, in conducting the business of banks of deposit and circulation, was under a continuing paramount charter contract with these depositor creditors, to keep its assets (1) out of real estate, and (2) in the form of currency and cash items, in order, as a solvent going concern, to pay them, in the due course of business, the amounts of their respective deposits, now represented by the $475,825.71 judgment.

In its relations to the public and its depositors, note holders and customers, the business of conducting a bank is very different from that of any other kind of business corporation.

Modern banking is the business of dealing in debts and credits, in commerce, in which the bank mainly occupies the position of debtor.

There are hundreds of national banks whose capital represents only a comparatively small percentage of the amount of their deposits.

We have seen that the relation of a receiving national bank to its depositors is, at once, that of a debtor.

Business corporations, as debtors, are not usually under any charter contract with their creditors, binding them to keep their assets in any particular form in order to meet their demands at maturity.

Not so, however, with a national bank. As a going concern, it is under a perpetual contract with the government—the whole people—with its depositors and creditors, by the very nature of its public service in the banking business it has bound itself to carry on, to at all times keep its assets in cash and available cash items. Otherwise, it can not perform its charter contract with its depositors and customers as such a bank.

Congress has manifested the greatest solicitude to maintain the solvency of national banks, to enable them, in the due course of business, to repay their creditor depositors in currency, by hedging about the charter contract powers of the banks with a number of restrictions, of which this court has said:

> "The object of the restrictions was obviously threefold:
>
> > "(1) It was to keep the capital of the banks flowing in the daily channels of commerce;

"(2) To deter them from embarking in hazardous real estate speculations; and

"(3) To prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain." (Bank vs. Mathews, 98 U. S., 621.)

Therefore, national banks are quasi-public corporations.

Their charter contract with the United States, and with each of their depositors, is to aid in promoting trade and commerce between the people of the United States—

(1) By supplying their circulation notes as a medium of exchange in trade and commerce.

(2) By providing safe places for the *deposit, payment and disbursement of government* as well as *private* funds and revenues.

(3) By affording convenient places where temporary loans can be secured by private individuals, upon giving "personal" security.

The contract of each national bank is, that it shall keep its assets generally in currency, cash items, discounts, etc., readily convertible into cash, and utilize the same to carry on and conduct its business as a bank of deposit, discount and circulation, as stipulated in the acts of Congress, by keeping its assets in capital flowing in the daily channels of commerce.

The limitations provided in the national bank act are intended to promote the keeping of the capital of the bank flowing in the daily channels of commerce, by deterring them from—

(a) Embarking in hazardous real estate speculations, or

(b) Accumulating a large mass of real and other property in their hands, to be held, as it were, in mortmain.

In effect, the national bank act, as the charter contract between the national bank and its depositors, must be read into the contracts comprising the transactions between Schleier and the National Bank.

These prohibitions in the charter contract of the National Bank render void all non-conforming stipulations contained in Schleier's contracts with the National Bank.

> "When the laws of the county or state provide restrictions upon individuals or corporations, foreign or domestic, which regulate the manner in which they shall do their business, or forbid them to do such business absolutely, or except under certain conditions, any contract with such corporation or individual, which, if sanctioned, would encourage them to evade such laws, is void." (Greenwood, Pub. Pol., 541.)
>
> Gibbs vs. Baltimore Gas Co., 130 U. S., 410.

> "Any act which is forbidden, either by the common or statutory law, whether it is *malum in se* or merely *malum prohibitum;* indictable or only subject to a penalty for forfeiture; or, however otherwise prohibited by the statute or the common law, can not be the foundation of a valid contract; * * * and this doctrine is the same in equity tribunals as in those of law." (Bishop on Contr. (Enl. Ed.), section 471; Hedges vs. Dickson County, 150 U. S., 182, 192; s. c., 37

Fed., 304; M. & S. C. Co. vs. C. C. T. P., 45 Fed., 336.)

"The mere tendency of a contract to promote unlawful acts renders it illegal, as against the policy of the law, without regard to any circumstances indicating the probable commission of such acts." (Bishop on Contr. (Enl. Ed.), sections 476, 525.)

As a quasi public corporation the People's National Bank could not make any binding valid contract with Schleier which would prevent, deter, impair, or tend to impair its ability to perform its public duties of supplying a currency by keeping its assets in the form of cash, and utilizing them according to the terms of the bank act, to promote, to promote commerce between the citizens of the city of Denver and elsewhere.

Therefore, when it is said in the opinion that—

"Nor do we perceive any reason why a national bank, when it purchases or leases property for the erection of a banking house, should be compelled to use it exclusively for banking purposes. It should be accorded with the *same rights that belong to other land-owners* of improving it in a way that *will yield the largest* income, lessen its own rent, and render that part of its funds which are invested in realty most productive." (Record, pages 106-7, lines 49-50, 1-5.)

"When an occasion arises for an *investment* in real property, for either of the purposes specified in the statute, *the national bank act permits* banking associations *to act as any prudent person* would act in making an investment in real estate, and to *exercise the same measure of judgment and discretion.*" (Record, page 107, lines 15-19.),—

the statement is not the law. A national bank has not, and never had for any purpose, the same unlimited discretion as an individual to "invest" its currency assets in realty.

The learned Court of Appeals practically so admitted before finishing its opinion.

It found itself unable to follow these premises to their legitimate conclusion. For, instead of saying that, therefore, the expenditure by the National Bank of all and more than its entire capital—$305,000—in the Bank building was lawful, it said:

> "The act complained of ('unauthorized expenditure' of the $305,000.00 capital and moneys) was not *malum in se*, but at most was simply *ultra vires*." (Record, page 109, lines 32-4.)
>
> "There are some *ultra vires* acts, when committed by a national bank, which the government alone is permitted to call in question *after such acts are committed*." (Record, page 110, lines 22-4.)
>
> "Moreover, when the conveyance is made (lease), and the *funds of the bank* have been *invested* therein, the estate so acquired becomes an asset of the bank." (Record, page 111, lines 6-8.)

These remarks suggest a limitation wholly immaterial to the rights of corporate creditors in collecting their debts.

The *ultra vires* acts of corporations with their assets are void, as to their then creditors, whether prohibited, or *malum in se*, or both, because such conduct is unlawfully prejudicial to their right to obtain payment of their debts out of the corporate property. Their rights to complain are not limited to *malum in*

se, ultra vires acts. (Waite on Fraud. Con. and Cred. Bills (2d Ed.), 567-8, section 411.)

> "The distinction between *malum in se* and *malum prohibitum* has long since been exploded." (Gibbs vs. Baltimore Gas Co., 130 U. S., 411-12.)

Whether exploded or not, a contract by a party to wilfully break a prior contract, embodied in a general law, comes very close to being an act evil in itself, at least for the purposes of civil liability.

It was further said:

> "The *case* is *not one* where the Bank assumed to exercise a *power which did not belong* to it, but it is a case where, in the exercise of a power which was clearly conferred, it misused or abused it by making *a greater expenditure for an authorized* object, than it ought to have made." (Record, page 109, lines 19-24.)

How an *ultra vires* transaction with the capital and assets of a banking corporation, continually bound by its charter contract with the government and its creditor depositors to keep its capital and money assets, in currency and cash items, so that as a going, solvent concern it may, in the due course of business, pay them their demands and, at the same time, "a greater expenditure than it ought to have made" in debarking such assets out of the banking business into the real estate business, can be said to be "*not malum in se*," but "for *an authorized* purpose," we confess we are at a loss to know.

We have shown that the subject of *ultra vires* belongs to the domain of *statutory contracts.*

It is a general principle of the law of contracts and statutes that two things must concur to enable one to sue for a breach of duty, whether imposed by contract or statute, viz.:

(1) The *plaintiff*, or those whom he represents, must be *within the purview* or protection *of* such *duty* imposed by such contract or statute, and

(2) He, or they, must sustain *damages* flowing from such breach of duty, touching the subject matter thereof.

This is the principle which explains the apparently conflicting decisions in the law of *ultra vires*.

> "The party injured by the violation of the law is the only one who can raise an objection." (2 Morse on Banks and Banking, 3d Ed., section 273.)

Therefore *existing* creditors may sue, and *subsequent* creditors may not sue for an *ultra vires* disposition of corporate assets. The duty and damage existed for the former, but not for the latter.

> "It is not and never has been true, except under the facts of peculiar cases, that the state is the only party which can challenge an *ultra vires* or prohibited contract made by a corporation. * * * A receiver or other judicial assignee standing in the right of its creditors and stockholders, may prosecute such action." (5 Thompson on Corp., section 6034; 2 Cook on Stock and Stockholders, section 665.)

A receiver representing the rights of creditors may maintain actions to recover moneys paid on

illegal or fraudulent claims to persons assuming to be creditors. (Taylor on Corp. (4th Ed.), 814.)

A receiver may assert the rights of creditors when affected by fraudulent or illegal acts of corporations. (Whittlesey vs. Delaney, 73 N. Y., 571, 574.)

He may reclaim bond exchanged, by the bank, prior to his appointment, with a director, for his stock in the bank. (Gillette, Rec., vs. Moody, 3 N. Y., 479.)

He may reclaim securities transferred by it in violation of the law. (Talmadge vs. Pell, 7 N. Y., 328; Bank Comrs. vs. St. Lawrence, 7 N. Y., 513; Atty. Gen. vs. Guardian Mut. Ins. Co., 77 N. Y., 272; Ellis vs. Little, 27 Kan., 707; Hayden vs. Thompson, 71 Fed., 64-65; Bank vs. Dovetail, etc., Co., 143 Ind., 543.)

A receiver may set aside dispositions of corporate assets in violation of general rules of law applicable to corporations.

Thus, he may avoid its chattel mortgage on the ground that it was not filed according to law. (F. L. & T. Co. vs. Minneapolis, etc., Wks., 35 Minn., 543; Bain vs. Brewer Pottery Co., 90 Fed., 754.)

Here the appellant receiver represents the People's Savings Bank and its depositors, holding an unsatisfied judgment against the National Bank for $475,825.71. This judgment relates back to the commencement of business of the National Bank on August 1, 1889, when the National Bank, as the depository of the Savings Bank and its depositors, occupied, towards them, the debtor relation.

The National Bank was under a prior and paramount contract—its charter—to devote its capital and moneys to the *public* purpose of conducting a

solvent bank of deposit, discount and circulation. Its shareholders were bound to content themselves with the profits to be realized from its capital, used in that banking business.

They could not lawfully divert the Bank's entire capital into dealings in real estate.

By the language of the act, any expenditure in excess was as much prohibited as if the whole expenditure was forbidden, for the reasons following:

The transaction between Schleier and the Bank, whereby it put its $305,000 capital into the eight-story building, of which it and the Savings Bank occupied one-half of one floor, which was not to be removed, and eventually be surrendered to Schleier, violated the letter and spirit of the national banking act, in the following particulars:

(1) It amounted to a permanent withdrawal of its capital—amounting to only $300,000—from the banking business, which is prohibited by the act.

> "Sec. 5204. *No association*, or any member thereof, *shall*, during the time it shall continue its banking operations, *withdraw, or permit to be withdrawn*, either in the form of dividends or otherwise, *any portion of its capital*," etc.
>
> U. S. Rev. St., section 5204.
>
> Ball on Natl. Banks, 204.
>
> Bolles, Natl. Bank Act, 58, section 125.
>
> Pratt's Digest, 1900, 98.

It is to be borne in mind that this case is not like that of solvent national banks in large cities. Their stockholders adopt the plan of carrying a large cash

surplus, out of which, instead of dividing the same in dividends among themselves, they devote it to the purchase or building of an expensive office or bank building, far more commodious than is required for their banking business.

With that practice, by rich national banks, we have no concern in this case.

This National Bank was authorized and actually commenced business on August 1, 1889. It had not been in business longer than one month and eleven days when it made the lease with Schleier, calling for the erection of the enormous and expensive building, in which it put its entire capital and more, $305,000.

(2) The personal covenant of the Bank to pay Schleier rent for ninety-nine years, at the rate of $13,975. amounting, in the aggregate, to $1,383,525, was a non-banking contract, incurring an indebtedness exceeding the amount of its $300,000 capital stock, in violation of the act.

"Sec. 5202. *No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock* at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"*First.* Notes of circulation.

"*Second.* Moneys deposited with or collected by the association.

"*Third.* Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"*Fourth.* Liabilities to the stockholders of the association for dividends and reserve profits."

U. S. Rev. St., section 5202.

Ball on Natl. Banks, 204.

Bolles, Natl. Bank Act, 52, section 106.
Pratt's Digest, 1900, 97-8.

On reading this section in the light of the definite purpose of Congress—to keep the banks as solvent, going institutions, providing currency for trade and repayment of their debts to depositors—it is seen that the *only contracts excepted* from the prohibition *are banking* contracts.

All other contracts, whereby a bank "shall (1) *at any time*, (2) *be indebted*, or (3) *in any way liable*, to an amount exceeding its capital stock," are prohibited in terms.

(a) The opinion confused the landlord's remedy with the tenant's substantive obligation on personal covenant.

The opinion started out to avoid this prohibition by citing *Lorillard vs. Clyde* (142 N. Y., 456) as an authority that "The *personal covenant* to pay rent would not be enforcable against 'the Bank' *after the* expiration of its charter." (Record, 108, lines 2-4.)

That case was a contract to pay over the dividends of a corporation, in existence when the contract was made, but since dead by the expiration of its charter, and was properly held to be at an end. When the corporation died, it could no longer pay dividends, and the subject-matter of contract ended. But possession conferred by a lease for a longer term than the corporate life of a bank is still existing subject-matter for the contract of lease.

But, as the chartered life of a bank is twenty years, that left seventy-nine years' rental at $13,975 per annum, amounting to over $900,000, still to be

accounted for in this case under this statutory prohibition.

So, finally, the opinion on this point was—

> That while the 99-year term lease was valid to vest *the entire 99-year term*, at the execution of the lease, *an asset in* the Bank (Record, 107, lines 37-45), *yet* the *Bank's personal covenant to pay rent* for such 99-year term was *not binding*. (Record, 108.)
>
> That such *personal covenant only bound* the Bank to pay "*rent earned by actual occupation* of the demised premises." (Record, 108, lines 26 et seq.)

Consequently the 99-years' *rental*, $1,383,525, *was not an indebtedness* exceeding the Bank's $300,000 share capital, which it was prohibited from contracting by section 5202.

Rent is compensation for the use of lands demised. (2 Woods Land. and Ten. (2d Ed.), 1016, sections 44-45.)

The suggestion that the Bank could take the benefits—the ninety-nine-year term without the burdens—its personal covenant to pay rent for that term, strikes one as a little illogical, at the very least.

At any rate, it is not the law.

The opinion (Dean vs. Caldwell, 127 Mass., 242, 244, cited by opinion) erroneously confused the landlord's right to prove his claim for rent against decedent and insolvent estates, for future rent, *not yet due*—which is one matter, very separate and distinct—with the obligation imposed by the tenant's *personal* covenant to pay rent.

The fact that an action is prematurely brought, in no respect tends to show that there is not an obligation to pay, when the time fixed, by the lease or other obligation, arrives for making such payment.

The opinion also cited Trust Co. vs. Armstrong, 35 Fed., 567, which simply held that the landlord had no claim on an insolvent estate, in the hands of a receiver, unless the receiver, in the exercise of his election, determined that a lease was in fact an asset, beneficial to creditors, and so accepted the lease. In which event, being only privy in law, and so not bound by any personal covenant of the tenant, he would only be liable during actual occupation of the premises.

These and other cases cited in the opinion in no respect correctly stated the law, as settled by this and other courts, which is as follows:

The validity of the Bank's covenant must be determined by the law at the time it was made. If valid then, it was so forever after.

"Neither *its own* act *nor* the *act* of the *law* will *release* the lessee from his *covenants*."

Hornby vs. Houlditch, Andrews, 40; 1 D. & E., 92.

Auriol vs. Mills, 4 D. & E., 99; s. c., 1 Smith's Lead. Cas. (8th Ed.), 1253. (*839, 846-7.)

"Injury by flood, fire or external violence, unless such destruction of the land as to amount to an eviction, *does not relieve* from the payment of *rent* under an *express* covenant."

Viterbo vs. Friedlander, 120 U. S., 712.

"The landlord can not claim a dividend from the estate of the tenant for *rent which has not yet accrued*, and the discharge of the tenant in bankruptcy is not a defense to a suit for rent falling due subsequently to the certificate.

"The principle is equally true, whether the proceeding is in bankruptcy or in insolvency."

Mills vs. Auriol, 1 Smith's Lead. Cas. (8th Ed.), 1267, n.

"Until the assignee or creditors' representative elect to take the term, it will remain in the lessee, with all the attendant rights and obligations, and even when the term is accepted by the assignees, and vests in them by operation of law, the lessee will still be bound by an express covenant to pay rent or perform any other duty imposed by the terms of the lease."

Mills vs. Auriol, 1 Smith's Lead. Cas. (8th Ed.), 1268, n.

"The *liability* of a lessee *on this covenant* alone will not be in any manner impaired or affected by his never taking possession, or by his act of assigning over the lease, but *remains valid* against him and his executors (having assets) *until the end of the lease*. The covenant, in the event of a tenant's alienation, affords the landlord a double claim for the payment of his rent; the assignee being chargeable in consequence of his privity of estate, and the original lessee continuing bound in respect to his contract."

1 Taylor's Land. and Ten. (8th Ed.), 434-5, section 371.

1 Washb. on R. P. (4th Ed.), 493, paragraph 4.

Sutliff vs. Atwood, 15 Ohio St., 186, 194.

Harmony Lodge vs. White, 30 Ohio St., 569, 574.

1 Wood's Landld. and Ten. (2d Ed.), 733, section 330.

Fletcher vs. MacFarlane, 12 Mass., 43, 46.

W. N. Gas Co. vs. Johnson, 123 Pa. St., 576; s. c., 10 Am. St., R. 555, and cases cited, note, page 559.

Bailey vs. Wells, 8 Wis., 141; s. c., 76 Am. Dec., 233.

Kimpton vs. Walker, 9 Vt., 199.

Walton vs. Cronley's Admr., 14 Wend., 64.

Port vs. Jackson, 17 Johnson, 239, 243-4.

Grommes vs. St. P. Trust Co., 147 Ill., 634, 648; s. c., 37 Am. St. R., 248, 255.

"Nor does the duration of the term (99 years) at all affect the obligation of such *express* covenant. * * * Indeed, it seems from the nature of the covenant itself, no distinction can be made on account of the duration of the term. It is a personal engagement to pay rent during the term, as long as assets can be found, the obligation may be enforced."

Taylor vs. DeBus, 31 Ohio St., 468, 471.

(b) The opinion attempted to engraft upon and add another exception to the four express exceptions contained in the section.

An exception nullifying the definite purpose of Congress in the bank act.

This is a power not possessed by the courts.

"The courts are not at liberty to insert limitations not called for by the sense, or objects, or the mischiefs of the enactment."

United States vs. Coons, 12 Pet., 72, 79.

"The plainest rules of propriety and justice require that the courts should not introduce an exception, the legislature having made none."

Galloway vs. Finley, 12 Pet., 264, 298.

(Demarest vs. Wynkoop, 3 Johns. Ch., 129, 142; Torrance vs. McDougald, 12 Ga., 526, 531; Endl. on Interp. Stat., page 23, section 17.)

"The distinction between an exception and a proviso is technical. The main distinction is in the matter of their pleading."

United States vs. Cook, 17 Wall., 177.

"Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. * * * Those who set up any such exception must establish it as being within the words as well as the reason thereof."

United States vs. Dixon, 15 Pet., 141, 165.

Minis vs. United States, 15 Pet., 423, 445.

Ryan vs. Carter, 93 U. S., 78, 83.

"The exception of a particular thing from general words proves that in the opinion of the

law-giver the thing excepted would be within the general clause had the exception not been made."

Brown vs. Maryland, 12 Wheat., 438.

Arnold vs. United States, 147 U. S., 499.

"It is only where the general language of a prohibition leaves it doubtful whether a particular thing is embraced, that the exception of another thing *of a similar kind* is to be construed as showing that the first was intended to be excluded."

Tinkham vs. Tapscott, 17 N. Y., 141, 152.

Black on Interp. Laws, 277.

"An express exception, exemption or saving excludes others. Where a general rule has been established by statute, with exceptions, the court will not curtail the former, nor add to the latter by implication." (Suth. on Stat. Constr., 414, section 328.)

"Express exceptions exclude others." (Suth., Stat. Constr., 412, section 326.)

"The statute having provided the way in which these half-breed lands can be sold, by *necessary implication prohibits* their sale in any other way."

Smith vs. Stevens, 10 Wall., 321, 326-7.

The construction of the opinion would result in throwing down the bars which Congress put up to preserve national banks as going, solvent concerns, and so is not permissible in any sound view of the law.

We regard this point as concluded by the principles of the following decision by this court, in which it is said:

"The legal existence of a national bank is not cut short by its insolvency and the consequent appointment of a receiver.

"After passing into the hands of a receiver, appointed by the comptroller of the currency, under the provisions of the Revised Statutes, a national *bank remains liable, during the remainder of the term*, for accrued and accruing rent under a lease of the premises occupied by it, although the receiver may have abandoned and surrendered them."

Chemical National Bank vs. Hartford Deposit Company, 161 U. S., 1.

The conduct denounced was "(1) at any time, (2) be *indebted*, or (3) in any way liable, &c.," in excess of its $300,000 share capital.

Therefore, the People's National Bank, by personally covenanting, in Schleier's lease, to pay him 99 years' rent, amounting to $1,383,525.00, did attempt to make a non-banking contract which was expressly prohibited by section 5202, and, therefore, absolutely void as tending to impair the Bank's ability to carry out the definite purpose for which its existence was solely authorized, the conduct of a *solvent* banking, and *not* the real estate business.

But, as has been elsewhere said (ante, page..), if the transaction was not illegal and *ultra vires* on this point, it was, nevertheless, invalid upon the other horn of the dilemma, viz., the gross inadequacy of consideration in allowing Schleier, as a creditor, for less than $6,000, with full knowledge, to take a $305,000 asset, the Bank's capital, the building, from the insolvent Bank, which agreed, in the pending suit, *not* to dispose of the building, on consideration of

protecting and releasing the Bank and its stockholders from future liability on the balance of the unexpired term of the 99-year lease, and leave these then suing depositors to hold a fruitless judgment for $475,875.71.

(3) The transaction was a debarking of its capital out of the banking business and into the real estate business, in fraud of the power to acquire by "purchase," for an office or banking house, such real estate as shall be necessary for the Bank's immediate accommodation in the transaction of its business, and no more.

It was an act which tended to thwart the Bank from reconverting into currency, to be returned to the banking business, any realty not necessary for the Bank's immediate accommodation in the transaction of its business for an office or banking house, at the earliest convenient moment, but in no event longer than five years after the same was acquired.

All in violation of the bank act.

"Sec. 5190. The usual *business* of each national banking association shall be *transacted at an office or banking house* located in the place specified in its organization certificate."

U. S. Rev. St., section 5190.

Ball on Natl. Banks, 189.

Bolles, National Bank Act, 17, section 40.

Pratt's Digest, 1900, 79.

"Sec. 5137. A national banking association may *purchase, hold* and *convey* real estate for the following purposes, and for *no others:*

"*First.* Such as shall be *necessary for its immediate accommodation in the transaction of its business.*

"*Second.* Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"*Third.* Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"*Fourth.* Such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it.

"But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

U. S. Rev. St., section 5137.

Ball on Natl. Banks, 141.

Bolles, Natl. Bank Act, 43, section 86.

Pratt's Digest, 1900, 19.

These express prohibitions upon the power of the National Bank in obtaining an office, must also be read in the light of the definite purpose of Congress, in creating such institutions.

They must likewise be read in connection with section 5202, just commented on.

The latter section expressly prohibits all contracts whereby a bank "shall, (1) *at any time*, (2) be indebted, or (3) in *any way* liable," in excess of the amount of its share capital, excepting upon four kinds of banking contracts.

This aims at preserving the solvency of the bank, as a going concern, to enable it to pay its depositors in full, in due course of business.

This same purpose is further advanced by the use of the word "purchase," in conferring the power to obtain real estate for an office.

We will not take time to determine whether the power to take a lease of a room or rooms in a building, already built, and, at most, only requiring the addition of such vaults as shall furnish a safe and convenient place for the currency, books, and other bank property, is included in this power to "purchase." That is not this case. In such a case, the most extravagant rental and terms, in an honestly made contract, could not come anywhere near absorbing the entire capital and rendering the bank insolvent, as it did in this case.

The act does not, in terms, mention the leasing of office quarters.

The seventh clause of section 5136, conferring the substantive banking powers, ends by granting "all such *incidental powers* as shall be *necessary* to *carry on the business* of banking," as thereafter expressly defined.

Section 5190 calls for an "office or banking house," so that this is sufficient to authorize an ordinary lease of quarters in a building already built.

The implied corporate power to lease quarters for "an office" does not authorize the corporation to enter into a building lease.

Schleier's lease was a building lease, involving more than the bank's entire capital, and so was not warranted by any implied authority to lease.

> "A lease is a contract for the *possession* and profits of land and tenements *on the one side,* and

the *recompense of rent* or property *on the other*." (18 Amer. and Eng. Ency. of Law, 2d Ed., 597.)

Such *implied* corporate *power* to take a lease *only extends to* carrying out the *objects* of its creation. (7 Amer. & Eng. Ency. of Law, 2 Ed., 720.)

The corporation only has "incidental power to agree to any *terms usual* in leases." (Amer. and Eng. Ency. of Law, 2 Ed., 806-7.)

The "*terms usual*" in leases, do not authorize or include the erection of a building.

> "Common and *usual covenants*," observed Lord Thurlow, in this case, "must mean covenants *incidental* to the lease." (Henderson vs. Hay, 3 Bro. C. C., 632, quoted in Taylor's Landld. and Tent., 8th Ed., 53, n. 2.)
>
> "*Usual* covenants are *implied* in all contracts for leases." (1 Woods' Landld. and Tent., 2d Ed., 347, section 183.)
>
> "They are the covenants by the tenant (1) to pay rent, (2) to pay taxes, (3) to keep the premises in repair; and, (4) to allow the landlord to enter to see the state of repair." (1 Woods' Landld. and Tent., 2d Ed., 349, section 183.)
>
> "A *covenant to build*, will *not* be *implied* or held as applicable to the relation, even though the agreement stipulates for such covenants in the lease." (1 Woods' Landld. and Tent., 2d Ed., 103, section 24.)

Therefore, there is no warrant of law, under the implied power to lease in order to obtain an "office," authorizing the People's National Bank to attempt to debark its capital out of the public service of conducting a solvent national bank, into the real estate and

renting business, for the private profit of its shareholders, by entering into this building lease, and erecting the eight-story building, with its $305,000.00 capital.

The power to "purchase such" real estate "as should be necessary for its immediate accommodation in the transaction of its business," did not warrant the National Bank in making the covenants and embarking $305,000 out of its banking business into the real estate and renting business, for the private profit of its shareholders, and to the insolvency of the Bank and the loss of these depositors.

The learned appellate court seemed to think that because, by a "purchase," it was possible to obtain a title in fee simple absolute to real estate, that, therefore, it conferred and contained power, by the Bank, to take anything savoring of realty, even to a chattel real—a lease, the bare right to possession—good only so long as the rent is paid, and that, in such a shallow bark, it might embark all its capital. This conclusion is reached by misapplying the maxim that the greater includes the lesser. (Record, page 106, lines 31-3.) The maxim is *purely* a *quantitive* one for the measuring of things *possessing* all the *same qualities.*

The court's error lay in confusing the method of acquiring title (purchase) with the quality of the estate, which might be acquired by such method.

The power to "purchase" is not a "greater" or general power.

On the contrary, for the following reasons, it is a specific power, to be strictly construed.

1. The statute power to purchase is a common law authority, analogous to a power of attorney. (1 Sugd. on Pow., section 1, paragraphs 1-2.)

A *special* power *differs from* a *general* one, in that it gives authority to do *only a particular act, instead* of *repeated* acts of a certain character. (Story on Agency, 9th Ed., section 17; Ewell's Evans Agency, *101-2.)

The only general powers conferred by the national bank act, calling for repeated acts day by day, are the general substantive banking powers, such as receiving deposits, making loans, issuing drafts or circulating notes, etc.

On the contrary, this *power to purchase* is *not* a *general* substantive banking power. It is not intended to be repeatedly exercised, day by day. It is not expected the bank will be buying and selling realty for banking business sites day by day.

This *power to purchase* is *a special* power, intended to be exercised only once; or, at least, at infrequent intervals, only so often as business prudence may require a change of location in the banking house.

Such special powers and corporate charter powers are both alike to be strictly construed against the donee and the corporation.

> "General words are to be construed in reference to the particular terms which form the subject-matter of the instrument, in furtherance of, but in subordination to, the general power conferred." (Geiger vs. Bolles, 1 Thomp. and C., 129; Washburn vs. Alden, 5 Cal., 463; Billings vs. Morrow, 7 Cal., 171; s. c., 68 Am. Dec., 235; Rountree vs. Denson, 59 Wis., 522; s. c., 18 N. W., 518.)

This power is, therefore, a special and not a general one. It must be strictly construed, in furtherance of, but in subordination to, the conduct of the general banking business, according to the prohibitions of the bank act.

The following case illustrates the strictness with which the Federal Supreme Court views a five (5) year lease made by a national bank:

> "By section 5136 of the Revised Statutes, a contract of lease, at a large rent, of an office to be occupied 'as a banking office, and for no other purpose,' for the term of five years, determinable at the end of any year by either party, executed by a national bank as a lease, after having duly filed its article of association and organization certificate with the comptroller of the currency, but not having been authorized by him to commence the business of banking, is void, and can not be made good by estoppel, and will not support an action against the bank to recover anything beyond the value of what it has actually received and enjoyed."
>
> McCormick vs. Market Bank, 165 U. S. Rep., 538, 539.

2. Moreover, the power to purchase is in terms expressly and specifically subordinate, subsidiary and incidental to the general substantive banking powers. It reads:

> "A national banking association may purchase, etc., real estate for the following *purposes*, and for *no others:*
>
> "First. Such as shall be *necessary* for its immediate accommodation *in the transaction of its business*, etc." (U. S. Rev. St., section 3157.)

This language—"for its immediate accommodation in the transaction of its business"—shows that the power to purchase is a subordinate, subsidiary, incidental power. It is intended only to aid and promote the business of the bank, by furnishing it with "immediate accommodation in the transaction of its business."

The national bank act does not contain any language authorizing a bank to unite and commingle the conduct of the banking business with the conduct of a real estate and rental business. This is expressly prohibited by the language of section 5737, which says :

> "A national banking association may purchase, etc., real estate for the following *purposes*, and for *no others*."

The "purchase" power to obtain a banking office must have a meaning consistent with the purpose of the act.

Of two meanings, that which more accords with the act must be preferred.

The transaction with Schleier was wholly inconsistent with the continuing solvency of the Bank.

Technically, "purchase" is one of the two methods of acquiring land titles. (Kent Com., 12th Ed., 373.)

It includes every lawful method of coming to an estate by act of the party, as opposed to the act of the law. (Burt vs. Merchants' Ins. Co., 106 Mass., 356, 364; Anderson's Dicty., 846, Title, "Purchase.")

This court has settled the statutory sense of "purchase" to be its ordinary untechnical meaning.

"But generally, in statutes as in common use, the word is employed in a sense not technical, only as meaning *acquisition by contract* between the parties, without governmental interference."

Kohl vs. U. S., 91 U. S., 367, 374.

"The word 'purchase' is to be taken to mean an acquisition of land for a valuable consideration."

Farrington vs. Wilson, 29 Wis., 383.

McCartee vs. Orphan Asy. Soc., 9 Cowen, 437, 504, 506-8.

Hoyt vs. Van Alstyne, 15 Barb., 572.

19 Amer. and Eng. Ency. Law, 571.

4 Kent's Com. (12th Ed.), *441.

Grant vs. Bennett, 96 Ill., 535.

Anderson's Dicty., 846, Title, "Purchase."

Clearly the bank's power to "purchase" was intended to empower it to acquire a fee simple title to its banking house.

If the technical sense of "purchase" be applied, the result is even more in accord with the definite purpose of the bank act—the solvency of the bank. For, technically, an heir, who is a devisee of an estate is said to take title, not in his status as heir, but by a "purchase." For, thereby he has a better title, free from incumbrances and charges which, as heir, he would be bound to take title subject to.

At common law the charter of a bank of discount and deposit does not confer unrestricted power to buy

and sell realty, because it is inconsistent with the end and purpose of banking institutions. (Thweat vs. Bank of Hopkinsville, 81 Ky., 15-6; Bank of Mich. vs. Nils, Walker's Chan., 100; Bank of Niles vs. Mich., 1 Doug. (Mich.), 401.

Power expressly granted to acquire realty for business purposes, or as security for indebtedness, is strictly construed. (Russell vs. Topping et al., 21 Fed. Cas., 60, No. 12, 163 (5 McLean, 194); Chautauqua County Bank vs. Risley, 4 Denio, 480, 487-8.)

Since, therefore, by the acquiring of a fee simple title, the only burden will be the payment of such taxes and assessments as are in each community imposed upon other property owners in fee, and the Bank will have what will in truth be an asset, which, if necessary, can be mortgaged or sold, and the Bank's solvency more nearly preserved than it can under a transaction like that of this Bank with Schleier, it is clear that this lease was not within the Bank's charter contract to "purchase."

The prohibitions limiting the power to "purchase" to

1. **"Such as shall be necessary,"**
2. **"For its immediate accommodation,"**
3. **"In the transaction of its business,"**

indelibly stamp the transaction between Schleier and the Bank as absolutely void as beyond the power of the Bank.

We have shown that the affirmative grants of charter powers to the Bank are pregnant with co-equal and correlative implied prohibitions, commencing with the limits of such affirmative grants, and having the same power as if express.

The ordinary meaning of the foregoing limits to the "purchase" power of the Bank absolutely voids the transaction with Schleier.

They serve to emphasize the purpose of Congress to keep the national bank solvent by keeping the assets in currency, and out of real estate. The language is:

> "Such (real estate) as shall be *necessary* for its (the bank's) *immediate accommodation* in the transaction of its business."

"Accommodation" means, "adjustment, adaptation, convenience." (Standard Dict., page 16.)

"Accommodate" signifies to make commodious. (Crabb's Eng. Syn., page 429.)

But the word "accommodation" is limited by the word "immediate."

The word "immediate" means, "separated by no appreciable space; very near; close; acting or acted upon, without the intervention of anything between cause and object." (Standard Dict., page 897.)

Therefore, the phrase, "immediate accommodation," used, as it is in the national banking act, concerning the bank and its business quarters,

(1) In respect to the element of *time*, that is, the *life of* the corporation;

(2) In respect to the element of *value*, that is, the *amount* of the bank's *assets invested* therein; and,

(3) In respect to the element of *space*, or the area thereof,

Was by Congress intended to be such as to expressly declare that there should not be any substantial disparity between the bank's business require-

ments and its place of business, in any of these elements.

The corporate body of the bank should be suitably habilitated during its life, much the same as the body of a living person should be clothed with a reasonably well-fitting "business" suit of clothes. There should be neither extravagance in expense or value, nor disparity in size. It should be suited to the business life of the owner.

The "immediate accommodation" is *a maximum* limitation, beyond which the bank may not go.

But the phrase, "immediate accommodation" is further qualified, restrained and modified by the word "necessary."

That word is defined as:

> "*Being such in its nature,* conditions or *relations,* that it *must exist,* occur, etc.
>
> "Indispensably requisite or absolutely needed to accomplish a desired result; essential; requisite.
>
> "Resulting from external or physical causes."
>
> Standard Dict., page 1182.

The word "*necessary,*" then, also speaks to the some relation between the needs of the bank as a corporate body, and the quarters comprising its place of business. It refers to what must be, and may therefore be said to be, *a minimum limitation,* less than which the bank may not do, for by statute it must have a place of business.

And when the word "*necessary,*" as *a minimum* limitation, is considered in connection with the words "*immediate accommodation,*" as *a maximum* limitation, the phrase, which altogether reads, "*Necessary*

for its immediate accommodation in the transaction of its business," clearly means that the business place of a national bank must be suitable to the accommodation thereof, and that any disparity between the bank and its quarters, either in the elements of space or area, or amount of value concerned, and the length of its corporate life (twenty years), is not to be tolerated or warranted under the law.

According, therefore, to the plain, obvious, ordinary meaning of the language, it is clear that a lease of a place of business for ninety-nine years, for a Bank whose existence is only twenty years, of a building of eight stories, when only one-half of one story was actually used by the Bank for its banking place, into which is embarked over $305,000, when its share capital was only $300,000, is absolutely beyond the power of the Bank, and void.

Not only is this so, but the very result which has occurred to this Bank, is the very thing which it was the aim, intent and purpose of the act of Congress to prevent.

The National Bank, by consuming more than the amount of its capital in the construction of an eight-story building, under the lease in question, for ninety-nine years, so embarrassed and hampered itself that it became insolvent.

It must be clear to any one that if this money had not been embarked in this real estate transaction, this Bank might still be a going institution at the present time. For, undoubtedly, the sum of $300,000 would have tided it over the panic, and saved not only the destruction of itself, but loss and damage to its depositors and creditors.

For these reasons, therefore, because the contract of lease is opposed not only to the specific intent of the specific provisions of the national bank act in relation to the purchase of real estate and the having of a business place, but also opposed to the general intent of the act, it is clear that the transaction of Mr. Schleier and the defendant National Bank concerning its $305,000.00 capital, was illegal and unauthorized, and beyond the power of the Bank to make.

The legitimate consequences of the transaction between Schleier and the Bank, whereunder its $305,000 in capital and money was put into the Bank building, was

(1) A debarking of its capital, theretofore pledged by charter contract to be kept in currency and used in conducting the business of a solvent National Bank, out of such banking business and into the real estate business.

(2) *It was an abandonment and disabling* of the National Bank from performing its public service for an attempted private gain of its shareholders, involving a private loss to the Savings Bank and its depositors.

(3) *It was a violation* of section 5204, prohibiting the withdrawal of its capital.

(4) *It was a violation* of section 5202, prohibiting the Bank from becoming "indebted or any way liable" to an amount in excess of its $300,000 share capital.

It stood the chance of losing the $305,000 capital —the building. For by the Bank's covenants the building was not to be removed, and was, at the end of the ninety-nine-year term, to go to Schleier or his assigns.

(5) *It was a violation* of section 5137, whereby the Bank was prohibited from taking out of its capital, and holding in real estate, any more than "such as was necessary for its immediate accommodation in the transaction of its business." The Bank had only been in business one month and eleven days, when, on September 12, 1889, it made its covenants in this lease.

It was only a year and five months old, January, 1891, when it had put its $305,000 into the building and moved into it.

The effect of the whole transaction was to commit a flagrant breach of the charter contract between the National Bank and the Savings Bank and its depositors, by disabling the former from being able, as a solvent National Bank, to repay the latter. It was, therefore, void.

> "A corporation can not disable itself by contract from performing the public duties which it has undertaken, and, by agreement, compel itself to make public accommodation or convenience subservient to its private interests." Gibbs vs. Baltimore Gas Co., 130 U. S., 410.
>
> Woodstock Iron Co. vs. Extension Co., 129 U. S., 644, 660-661.

The National Bank, being in possession of its $305,000 capital—the building—down until after the suit of the Savings Bank was commenced, and being insolvent, as well as in the course of liquidation, and having agreed in such suit that it would not dispose of the building, this appellant receiver, as their representative, was and is entitled to follow and recover

such $305,000 capital and moneys to pay their $475,825.71 judgment, rendered in such suit.

He has the status and right of the Savings Bank and its depositors, who were creditor depositors before and when these unlawful transactions between the Bank and Schleier occurred.

Schleier was a purchaser with *guilty* knowledge, and by his threats introduced the further illegal element of exchanging one asset—the building—for another asset, the stockholders' liability—thus at one stroke wiping out substantially *all* the Bank's assets.

(4) The transaction of October 30, 1897, between Schleier and the Bank, in view of the Bank's insolvency and liquidation, was a transfer prohibited by the act prohibiting preferences.

> "Section 5242. * * * All transfers of the notes, bonds, bills of exchange or other evidence of debt owing to any national banking association, or of deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, *made after the commission* of an act of insolvency, *or in contemplation* thereof, made *with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another*, except in payment of its circulating notes, *shall be utterly null and void.*"
>
> U. S. Rev. St., section 5242.
>
> Ball on Natl. Banks, ...
>
> Bolles, Natl. Bank Act, 191, section 409.
>
> Pratt's Digest, 1900, 138.

Under that part of the argument showing Schleier was not an innocent purchaser (ante, pages 21, 25-8), the decisions are cited construing this section.

We insist that the Bank's covenants that the building, its $305,000 capital, should not be removed, but eventually be surrendered to Schleier, was an act attempting to give Schleier a preference, in case of or in contemplation of insolvency, denounced by section 5242. Schleier's title was executory, because of the Bank's possession during its insolvency, caused by the erection of the building. He received full payment of his rent during all the years of the Bank's insolvency, up until the three last months prior to October 30, 1897. The charter contract was an inseparable part of the Bank's deal with Schleier, including the above section. Any contract for a preference was and is void.

The following case illustrates the principle:

> "A power to trustees of a public turnpike act, which authorized them to mortgage the tolls, but declared that there should be *no priority among* the creditors, *does not authorize a mortgage* of the toll-houses or turnpike gates, because if any creditor had a power, to enter and take possession of the toll-gates, he would gain a priority which the act has denied."
>
> 1 Sugden on Powers, 555 (*517).
>
> Fairtitle vs. Gilbert, 2 Term. Rep., 69.

We insist that if every transaction by the Bank and Schleier down to October 30, 1897, was valid, yet the bill stated a case for equitable relief.

Schleier's full knowledge of the agreement of the Bank, in the pending suit, not to dispose of the same;

The insolvent condition of the Bank;

The Bank's being in voluntary liquidation;

The misrepresentation that the income of the Bank building was less than the fixed charges, so that it was a losing, when, in fact, it was a gaining venture (the Bank had paid the rent ever since 1893, over four years, and no one had suggested that it was losing, until three months before its transfer to Schleier, when the million-dollar suit of the Savings Bank was nearing judgment).

The threats of Schleier to hold the Bank and its stockholders liable upon the personal covenant to pay rent for the remaining 91 years of the lease, and,

Their too ready acceptance of the proposition, and consequent liquidation of their stockholders' liability, itself an asset of the Bank, for the creditors' benefit; and,

The gross inadequacy of deeding a $305,000 building, which was not a losing investment, to satisfy a demand less than $6,000—

Certainly presents a case which ought to appeal most strongly to a court of equity, for relief.

A court of chancery ought to be able to find some way to restore to the 5,000 small Savings Bank's depositors—the tradesmen, mechanics, laborers, servants, shop girls, minors and others—who have worked early and late, suffered privations to lay by a few dollars for a rainy day, who have thus found their all swallowed up in a most inequitable and unconscionable transaction, to the preference of what, at best, is a *malum in se* claim of a single creditor, and the pro-

tection of the stockholders of the Bank, while they are left to hold a fruitless judgment.

The amounts of the claims of the Savings Bank's depositors was an honest debt, incurred under honest circumstances, for which they do not seek anything more than just payment in full. They do not seek to have more than due.

That is a great deal more than can be said for Schleier, in his seeking to hold a $305,000 building for less than a $6,000 debt.

> "As between the creditors of a bank, those whose debts were created under the lawful power given by the charter must be preferred to those who claim under a contract that the bank, under its charter, has no power to make."
>
> Bank of Chattanooga vs. Bank of Memphis, 9. Heisk., 408.
>
> Taylor on Corp., section 272.
>
> Marshall vs. Grand Gulf R. R. and Bank Co., 12 Rob., 198.
>
> Fox vs. Seal, 22 Wallace, 484.
>
> Davis vs. Flagstaff Silver Min. Co., 2 Utah, 74.
>
> St. L. Drug Co. vs. Robinson, 81 Mo., 18.
>
> Abbott vs. Baltimore, etc., St. P. Co., 1 Md. Ch., 542.
>
> Natl. Bank vs. Keefer, 95 Ky., 97; s. c., 23 S. W., 675.

We respectfully submit that there is equity in the bill to which the demurrer was sustained, as well as in the amended bill tendered for filing. That this

appellant receiver representing those who were creditors during and prior to the time of the wrongful expenditures, and while the title to the building was executory, and in the possession of the Bank, was entitled to sue as well as the government.

That for these reasons the judgment should be reversed, which is accordingly respectfully prayed.

IX.

THE AMENDED BILL OF COMPLAINT SHOULD HAVE BEEN ALLOWED TO BE FILED.

When, at the circuit, the demurrer was sustained to the "complaint as amended" for want of equity in the bill, because no one but the United States could make the objction (Record, page 96, folios 145-6), it was thought the matter might be made to appear more clearly to the trial court if the debtor and creditor relation between the two Banks was carried back from July, 1893, when both banks first failed, to the first of August, 1889, prior to the making of the lease, when the National Bank first commenced business.

Also, if the sworn statements made five times each year expressly showing the building to be an asset of the Bank of over $300,000 value should be expressly pleaded—they being referred to in appellee Schleier's demurrer to the bill as being insufficient because,

> "nowhere denying that such lease and building were mentioned as resources five times each year in the published statements required of the said National Bank by the United States national

bank act." (Schleier's Demurrer, Record, page 31, folio 44.)

the case might appear more clear in its inequities.

But both the Circuit and appellate courts have held that there is no equity in the bill, for the reason that only the United States can raise the question presented, and, consequently, that then existing creditors, The People's Savings Bank and its then depositors, can not. Therefore, that ruling practically eliminates the question of the "amended bill of complaint."

However, if either of the above facts become material to this court in considering this case, the pleading tendered for filing is in the record, and we must be understood as claiming the right to have it filed, if it would have obviated the objection, of want of equity in the bill.

X.

IF ONLY THE GOVERNMENT CAN RAISE THE OBJECTIONS TO THE NATIONAL BANK'S UNLAWFUL ACTS,

THEN IT IS DOING SO THRO ITS ALTER EGO, THE COMPTROLLER, UNDER WHOSE EXPRESS DIRECTION THIS SUIT IS BROUGHT.

THE COMPTROLLER, AND HIS APPOINTEE, THE RECEIVER,

ARE BOTH PUBLIC OFFICERS ENGAGED IN THE PERFORMANCE OF THE SOVEREIGN DUTY OF DOING JUSTICE BETWEEN THE INSOLVENT NATIONAL BANK AND ITS CREDITORS

BY ADMINISTERING THE ESTATE OF THE INSOLVENT NATIONAL BANK,

UPON THE EXPRESS STATUTORY ORDER OF THE UNITED STATES,

THE NATIONAL BANK ACT.

> "The United States is a government, and, consequently, a body politic and corporate."
>
> United States vs. Morris, 2 Brock., 96; s. c., 26 Fed. Cas., 1211, 1216.
>
> 5 Thompson's Com. on Corp., section 5785.

It, therefore, (1) possesses and enjoys property,—for its *governmental* purposes,—(2) may and does deal with its citizens in much the same way as they deal with each other, i. e., in a *private proprietary* contractual capacity.

Therefore, the United States as a corporate body in dealing with its citizens, whether natural, or artificial personages, sustains two classes of relations, which may be said to represent its two classes of substantial rights, viz.:

First—Public, governmental or sovereign; and,

Second—Proprietary, or, in a sense, private contractual, as contra-distinguished from the first class of substantive rights.

U. S. vs. U. Pac. R. R. Co., 98 U. S., 569, 613.

Sinking Fund Cases, 99 U. S., 700, 724.

The United States, as a public corporation, therefore possesses and exercises two distinct classes of powers, viz.:

1. Those sovereign and legislative governmental, collective public rights possessed by every governing corporation of our form of government, and,
2. Those of contract, that are more nearly akin to private proprietary rights.

The chartering of national banks by the grant of their corporate franchises is clearly a sovereign legislative act, comprising a *power of the* first class (U. S. vs. U. Pac. R. R. Co., *supra;* Bank vs. Dandridge, 12 Wheat., 64, 68; Bank vs. Earl, 13 Pet., 579).

The United States may become a depositor of its funds in a national bank. It is then dealing with the bank in much the same relation as any private individual depositor. It is held not to be entitled to the preference ordinarily given by writers to the sovereign in other forms of government. (Cook Co. Nat'l Bank vs. U. S., 107 U. S., 445, 448.)

Being a depositor is clearly an act, power and right of the second class.

In this case the United States was in no way interested as a depositor, or otherwise, under any rights, powers or acts of the second class.

The only other relation, therefore, which the United States bear to this or any National Bank, under the national bank act, is that of *a government* exercising its *sovereign*, legislative and executive governmental control over a corporation, which it has created, but has *no proprietary interest in*, for the *administration and distribution of the assets* of such insolvent Bank, by the acts of the public officers of the executive department of the government of the United States.

This suit is brought and prosecuted by the appellant receiver, under the express direction and order of the comptroller of the United States.

The comptroller is, so to speak, the *alter ego* of the United States. In the creation of banks, he may withhold his certificate to commence business (section 5169).

Their continuance in business, and their dissolution, is by law wholly placed in his hands.

He is "expressly charged with the execution of *all laws* passed by Congress, relating to the national currency" and the banks. (Section 324.)

The receiver is appointed by, and always remains, "under the direction of the comptroller" (section 5234).

Both the comptroller and his receivers are agents and *public* officials of the United States, who sue in the Federal Courts without regard to their citizenship or the amount involved. (Kennedy vs. Gibson, 8 Wall.,

498; In re Chatwood, 165 U. S., 443; Sonnentheil vs. Christian Morlen Brewing Co., 172 U. S., 401; Auten vs. U. S. Natl. Bank, 174 U. S., 125, 141; Price, Rec., vs. Abbott, 17 Fed., 506; Stephens vs. Bernays, 41 Fed., 401.)

The comptroller and his receiver occupy public stations, or employment, under the United States. (U. S. vs. Hartwell, 6 Wall., 385; Hall vs. Wisconsin, 103 U. S., 5, 8.) In them, as such public officers and agents of the United States, is vested a portion of the sovereignty of the United States, in enforcing the municipal regulations affecting the general interests of the people in their dealings with the national banks. (Hall vs. Wisconsin, 103 U. S., 5, 9.)

National banks are *quasi* public corporations, created for the performance, as instrumentalities of government, of the important public service of furnishing currency to promote trade and commerce between its citizens. This they are to do by conducting the business of banks of discount, deposit and circulation, as provided by the national bank act. (Ante, pages 57-65.)

In the United States, a republic, its highest and most sacred sovereign duty is the administration of justice between its citizens, so as to preserve that equality of right between them, which is the test of its citizenship.

> "A state is a body of free persons, united together *for the common benefit*, to enjoy peaceably what is their own, and to DO JUSTICE *to others*." (Chisholm vs. Georgia, 2 Dall., 456.)

This includes the furnishing of (1) the *tribunal*, (2) the *remedy*, and (3) the speedy *administration*

of the remedy. These comprise that most sublime act of sovereign power—the administration of justice between its citizens.

The national bank act contains all three of these elements.

The *tribunal* is of the executive branch of the government, that particular bureau presided over by the comptroller of the currency, aided by his subordinates, the bank examiners and bank receivers.

The *remedy* is the constant supervision exercised by the government over the exercise of the franchise—the conduct of the banking business. The bank must report its condition at least five times each year (section 5211) in the form required by the comptroller (section 5211). The bank examiners are, also, from time to time, continually making repeated and unannounced examinations of the banks' books, assets and affairs and reporting thereon to the comptroller.

These frequent examinations and reports, together with numerous statutory safeguards, are intended to keep the banks solvent, going institutions. But, if they fail, the act provides the whole remedy.

> "The national bank act contemplates the *statutory mode* of *dissolving, winding up and settling the affairs* of a national bank *by the comptroller* of the currency, *through the appointment of a receiver;* nevertheless, the exercise of this statutory power is not the exclusive or only remedy which a creditor may invoke. A creditor of a national bank has his election to proceed either under the national bank act or by the exercise of the ordinary powers by the appoint-

ment of a receiver in an equitable action in a court of equity."

Wright vs. Merchants' Natl. Bank, 1 Flip. C. Ct., 568; s. c., 30 Fed. Cas., 679, case No. 18,084.

Irons vs. Mfg. Natl. Bank, 6 Biss, 301; s. c., 13 Fed. Cas., 100; also, 120 U. S., 27.

The history of the times when national banks were created supplies the reason for these provisions.

At the opening of the civil war, in 1861, there were 1,600 state banks, organized under laws of thirty-four different states, having a circulation of $202,000,000 of uncertain value, through bad management, of which about $50,000,000 was in the rebel states. The federal treasury was empty, and its expenses were rapidly nearing a million a day. For the year ending June 30, 1861, the government revenues were only $41,000,000.00, the expenses $62,000,000.00, and the estimated expenses under President Lincoln's call for 400,000 troops was $318,000,000.00. (History for Ready Reference, etc., Larned, volume 3, page 2219.)

Strict and *vigilant* indeed must be *the supervision* over the business and affairs, and *forceful, speedy* and *equitable* must be *the remedy* for securing and administering the assets of insolvent banks, in order to restore the business confidence of the people, well nigh exhausted in their dealing with the unstable and worthless wild cat banks and currency of the state banks, so as to raise means to save the nation.

Indeed, this unceasing and high degree of watchfulness in sovereign visitorial power is almost equiv-

alent to the bank's being at all times in the legal custody and possession of the United States.

In actual practice, the step from governmental supervision to actual legal custody and possession is so slight, that it frequently occurs, by the bank examiner, on discovering an unfavorable condition, being converted at once into a custodian, and then himself or another, by the comptroller's order, in executing the law, taking possession as receiver.

In a private action there must exist the elements of, (1) the private substantive right of the citizen, (2) the appropriate remedy, provided by law, which the citizen is at liberty to invoke, and (3) the appropriate tribunal authorized by law to administer the remedy invoked.

The national bank act combines these three elements into the statutory remedy of which the receiver is a part.

The comptroller and his subordinate, the receiver, comprise not only element (2) of a private action—the appropriate remedy provided by law—but also element (3), the appropriate tribunal empowered to administer the remedy. The bank act goes even further. In order to restore the public confidence, so greatly shaken by its sad experience with long, tedious, expensive and often fruitless equity suits to uncover and recover lost and wasted assets of state banks, the United States has assumed, as a party to and a part of the charter contract, the duty not only of providing, but also *upon its own motion, of enforcing, through its own executive public officers*, the *tribunal* and *the remedy*.

Congress makes it the duty of the United States district attorney, under the provisions of section 380,

Pratt's Digest, page 163, paragraph 153, to represent the United States and its officers and agents in all proceedings under the national bank act.

Mark you, this is done *on the government's own motion*, and not by private creditors, in a private action in equity.

The government of the United States, as the sovereign governmental grantor of every national bank's charter-contract, has pledged itself to all those who deal with national banks, as the possessor of sovereign powers of administering justice intended to be exercised for the benefit of its citizens, to execute the statutory remedy of the act and speedily administer upon the assets of an insolvent national bank, for the purpose of securing an equal and ratable distribution of its assets among all its unsecured creditors, giving the United States only a limited priority.

Case vs. Terrell (11 Wall., 199) has no application. Representation to *enforce* the law *against* others is a very different function from representation for *subjecting* the *principle to* a *pecuniary liability*.

It is not claimed that the receiver is here representing the United States in any proprietary contract, creditor sense, so that a judgment could be entered against it as a creditor of the insolvent Bank, as was attempted and denied in the correctly decided case of *Case vs. Terrell*, 11 Wall., 199. The sovereign can never be sued without its consent.

The act of the agent is the act of the principal. The appellant receiver is the ultimate agent of the United States, in performing its pledge to its citizens, to secure their rights out of this insolvent bank.

Therefore, if no one but the government may protect the rights of these creditors, then, we say, for the foregoing reasons, the government is, in legal effect, doing so here, in prosecuting this suit under the express direction of the comptroller.

For all the foregoing reasons it is submitted there was equity in the bill, and the demurrer should have been overruled, instead of sustained.

The amended bill should have been allowed to be filed.

Very respectfully submitted,

HARPER M. ORAHOOD,
JAMES H. BROWN,
Solicitors for Appellant.

FEDERAL STATUTES CONCERNING NATIONAL BANKS.

"THE NATIONAL BANK ACT."

"Be it enacted, etc., (1) that the *act* entitled, 'An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June third, eighteen hundred and sixty-four, *shall hereafter be known as 'The National Bank Act.'*"

Supplmt. to R. S. of U. S., Vol. 1 (2d Ed.), 1874-91, 27.

Ball on Natl. Banks, 46.

Bolles, Natl. Banking Act, —.

Pratt's Digest, 1900, 165.

ORGANIZATION CERTIFICATE.

"Sec. 5134. The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

First. The name assumed by such association; which name shall be subject to the approval of the comptroller of the currency.

Second. The place where its operations of discount and deposits are to be carried on, designating the state, territory, or district, and the particular county and city, town or village.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantage of this title."

U. S. Rev. St., section 5134.

Ball on Natl. Banks, 47.

Bolles, Natl. Banking Act, 6, section 14.

Pratt's Digest, 1900, 5.

CORPORATE POWERS OF ASSOCIATIONS.

Sec. 5136. Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

(PRIMARY, SUBSTANTIVE BANKING POWERS.)

(SECONDARY, SUBORDINATE, INCIDENTAL POWERS.)

First. To adopt and use a corporate seal.

Second. To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend,

(PRIMARY, SUBSTANTIVE BANKING POWERS.)	(SECONDARY, SUBORDINATE, INCIDENTAL POWERS.)
	in any court of law and [or] equity, as fully as natural persons.
	Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.
	Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.
Seventh.....	To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary
to carry on the business of banking,	
(1) By discounting and negotiating promissory	

(PRIMARY, SUBSTANTIVE BANKING POWERS.)

notes, drafts, bills of exchange, and other evidences of debt;

(2) By receiving deposits;

(3) By buying and selling exchange, coin, and bullion;

(4) By loaning money on personal security;

(5) By obtaining, issuing, and circulating notes according to the provisions of this title.

(SECONDARY, SUBORDINATE, INCIDENTAL POWERS.)

"But no association shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the comptroller of the currency to commence the business of banking."

U. S. Rev. St., section 5136.

Ball on Natl. Banks, 49.

Bolles, Natl. Banking Act, 23, section 49.

Pratt's Digest, 1900, 6.

PLACE OF BUSINESS AND BANKING HOUSE.

"Sec. 5190. The usual *business* of each national banking association shall be *transacted at an office or banking house* located in the place specified in its organization certificate."

U. S. Rev. St., section 5190.

Ball on Natl. Banks, 189.

Bolles, National Bank Act, 17, section 40.

Pratt's Digest, 1900, 79.

APPOINTMENT OF OCCASIONAL EXAMINERS.

"Sec. 5240. The comptroller of the currency, with the approval of the secretary of the treasury, shall, as often as shall be deemed necessary and proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and, in doing so, to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the comptroller."

U. S. Statutes, section 5240.

Ball on Nat'l. Banks, 239, 239.

U. S. Compiled Statutes, 1901, volume 3, page 3516.

REPORTS TO COMPTROLLER OF THE CURRENCY.

"Sec. 5211. Every association shall make to the comptroller of the currency not less than five reports during each year, according to the form which may be prescribed by him, verified by oath or affirmation of the president or cashier of such association, attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the associations (association) at the close of business on any past day by him specified; and shall be transmitted to the comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the comptroller shall be published in a newspaper pub-

lished in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the comptroller. The comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition."

U. S. Statutes, section 5211.

Ball on Nat'l. Banks, 211.

U. S. Compiled Statutes, 1901, volume 3, page 3498.

LIMITATIONS UPON CONTRACT POWER OF BANK.

(1ST) AS TO ACQUIRING REAL ESTATE FOR BANKING HOUSE, ETC.

"Sec. 5137. A national banking association may *purchase, hold* and *convey* real estate for the following purposes, and for *no others:*

"*First.* Such as shall be *necessary for its immediate accommodation in the transaction of its business.*

"*Second.* Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"*Third.* Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"*Fourth.* Such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

U. S. Rev. St., section 5137.

Ball on Natl. Banks, 141.

Bolles, Natl. Bank Act., 43, section 86.

Pratt's Digest, 1900, 19.

(2D) LIMIT OF INDEBTEDNESS TO AMOUNT OF SHARE CAPITAL.

"Sec. 5202. *No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock* at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits."

U. S. Rev. St., section 5202.

Ball on Natl. Banks, 204.

Bolles, Natl. Bank Act, 52, section 106.

Pratt's Digest, 1900, 97-8.

(3D) LIMITATION BY PROHIBITION AS TO WITHDRAWAL OF CAPITAL.

"Sec. 5204. *No association,* or any member thereof, *shall,* during the time it shall continue its banking operations, *withdraw, or permit to be withdrawn,* either in the form of dividends or otherwise, *any portion of its capital,* etc."

U. S. Rev. St., section 5204.
Ball on Natl. Banks, 204.
Bolles, Natl. Bank Act, 58, section 125.
Pratt's Digest, 1900, 98.

(4TH) AS TO CONTRACTS IN CONTEMPLATION OF INSOLVENCY, WITH A VIEW TO GIVING PREFERENCES.

"Sec. 5242. * * * All transfers of the notes, bonds, bills of exchange or other evidence of debt owing to any national banking association, or of deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, buillion or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, *made after the commission* of an act of insolvency, *or in contemplation* thereof, made *with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another,* except in payment of its circulating notes, *shall be utterly null and void.*"

U. S. Rev. St., section 5242.
Ball on Natl. Banks, ...

Bolles, Natl. Bank Act, 191, section 409.
Pratt's Digest, 1900, 138.

DIVIDENDS TO CREDITORS.

"Sec. 5236. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make *a ratable dividend of the money* so paid over to him by such receiver *on all* such *claims* as may have been *proved* to his satisfaction *or adjudicated* in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

U. S. Rev. St., section 5236.
Ball on Natl. Banks, ...
Bolles, Natl. Bank Act, 209, section 457.
Pratt's Digest, 1900, 133.

PENALTY FOR VIOLATION OF THE NATIONAL BANK ACT.

"Sec. 5239. If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, *all the rights, privileges and franchises* of the association *shall be thereby forfeited.* Such violation shall, however, be determined and adjudged by a

proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be declared dissolved. *And* in cases of such violation, *every director* who participated in or assented to the same shall be held *liable in his personal and individual capacity for all damages* which the association, its shareholders, *or any other person,* shall have sustained in consequence of such violation."

U. S. Rev. St., section 5239.

Ball on Natl. Banks, ...

Bolles, Natl. Bank Act, 212, sections 464, 128.

Platt's Digest, 1900, 136.

RECEIVER FOR VIOLATION OF LAW—INSOLVENCY.

"Sec. 1. That whenever any national banking association shall be dissolved, and its rights, privileges and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or *whenever any creditor* of any national banking association *shall have obtained a judgment against it in any court of record,* and made application, accompanied by a certificate from the clerk of the court stating that such *judgment* has been rendered and has *remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency* of the national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association, and

enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes."

Supplmt. Rev. St. U. S., Vol. 1, 74-91, 107, section 1.

Ball on Natl. Banks, 244.

Bolles, Natl. Bank Act, 212, section 465.

Pratt's Digest, 1900, 136.

(18782.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 554.

EDWIN F. BROWN, AS RECEIVER OF THE PEOPLE'S NATIONAL BANK OF DENVER, COLORADO, APPELLANT,

vs.

GEORGE C. SCHLEIER AND THE PEOPLE'S NATIONAL BANK OF DENVER, COLORADO, APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT OF APPELLEES.

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STATEMENT OF CASE.

The salient facts in this controversy, disclosed by the bill of complaint, may be thus summarized:

The People's National Bank of Denver, Colorado (organized under the national banking act, with an *original* authorized capitalization of three hundred thousand dollars), being fully authorized and empowered to exercise any and all corporate powers pertaining to national banks, desiring to provide itself with a banking house in which to transact its corporate business and affairs, entered into a contract, on the 12th day of September, A. D. 1889, with appellee, George C. Schleier, whereby the latter demised to the Bank, "*its successors and assigns*," by written lease, under seal, bearing said date, certain real estate situate in the city of Denver, for the term of ninety-nine (99) years, from February 1, A. D. 1890, for the annual rental of thirteen thousand nine hundred and seventy-five ($13,975.00) dollars, payable in proportionate monthly installments, the first thereof being due and payable on the 15th day of February, A. D. 1890. The lessee (its successors and assigns) was given the option to extend the demised term for a period of fifty (50) years, after the expiration of the ninety-nine (99) years, upon the same *rental* stipulated to be paid for the original term.

The lease contained a covenant on the part of the lessee Bank, that within eighteen months from February 1, A. D. 1890, it would build and complete, at its own cost and expense, upon the demised premises:

> "A good, substantial building, not less than four stories in height, to cost not less than one hundred thousand ($100,000.00) dollars."

Coupled with the provision:

> "Said building and improvements erected or made upon said premises shall at once become a part of ..... the real estate hereinbefore demised, without any right on the part of anyone whomsoever to remove the same or any part thereof, except for the purpose of remodeling, rebuilding, or improving the same."

The lessor covenanted to remove, at his cost and expense, from the demised premises, certain existing store rooms, then situate thereon.

The lease contained a further covenant, on the part of the lessee, to insure the improvements on the demised premises against loss or damage by fire; taxes and assessments upon the property, during the demised term, to be also borne by the lessee, its successors and assigns.

Prior to and at the time of the execution and delivery of the lease, the lessor was seized of a fee simple, unencumbered title to the whole and every part of the demised premises, and such lease, after due execution, both by the lessee and lessor, and delivery thereof, was filed for record during the month it was executed, and duly recorded, September 21, 1889, pursuant to the statutes of the state of Colorado, in the office of the clerk and recorder of Arapahoe county, in said state, wherein the city of Denver is located.

The lessor duly complied with and fully executed all of his obligations, assumed or created by the lease, by delivering possession of the demised premises to the lessee, and by the removal from the demised premises, at his own expense, of all of the existing buildings and structures thereon. The lessee thereupon took possession of the demised premises, and, pursuant to the covenant in that behalf contained in the

lease, proceeded to construct a good, substantial building upon the property; but, instead of contenting itself with erecting a structure of the size and cost called for by the lease, it voluntarily built an eight-story building, sub-divided into two large banking rooms, with burglar-proof vaults, on the main floor, a number of store rooms on the ground floor; the remainder of the building was divided into eighty-four rooms, suitable for use as offices; the total cost of the structure, when completed, being about three hundred and five thousand ($305,000) dollars.

Such increase in the dimensions of the building, as well as the cost thereof, in excess of the stipulations in the lease, were all had and done by the Bank, as lessee, without any request on the part of the lessor, and without any mutual understanding or agreement in the premises, the Bank exercising its legal right and privilege, as lessee, to construct upon the leased premises a building of such dimensions and design as it conceived to be suitable and proper for its uses as a banking house, without limiting itself to the size and cost stipulated in the lease.

The lessor did not protest or object to the construction of a larger and more costly building than that called for by the lease, and his mere inaction in this respect is all that is charged against him in that behalf.

The bank building was completed and fully paid for by the Bank by January, A. D. 1891, and promptly thereafter it moved into such building, and used and occupied one-half of the first or main floor for the transaction of its legitimate banking business, and permitted another bank, known as the People's Savings Bank, organized under the laws of the state of Colorado, to use a portion of the same floor for the carrying on of its banking business. The remainder of the building, not actually used for banking purposes, was rented

by the lessee National Bank for office and store purposes; it deriving an income from the office and store rooms so let.

The lessee National Bank continued to do business in the ordinary course, as a banking association, until the 19th day of July, *A. D. 1893*, on which date, being upable to pay its depositors in due course of business, the comptroller of the currency appointed a receiver for the Bank, who remained in possession of its assets and affairs for about *one month*, when, upon the agreement of the Bank to make a voluntary assessment upon its shareholders of twenty per cent. to restore the impairment of its share capital, the receiver was discharged and the Bank thereupon resumed business in said bank building, and continued to carry on a banking business until the 20th day of December, *A. D. 1899*, when the comptroller of the currency, becoming satisfied that the lessee National Bank was insolvent, appointed a receiver for it and its assets, to wind up its business and affairs, pursuant to the provisions of the national banking act in that behalf.

More than two years prior to the appointment of the last mentioned receiver, to wit, in the year 1897, the lessee Bank was in default in the payment of rent to the lessor, Schleier, for the demised premises, for the months of August, September and October of that year, and was then also in default in the payment of certain taxes and assessments upon the demised premises, theretofore due and payable; such defaulted rents, taxes and assessments amounting in round numbers to the sum of six thousand ($6,000.00) dollars. Under these conditions a meeting of the stockholders of the lessee Bank was duly called and held, to consider the proposition of surrendering the remainder of the leasehold term, including the bank building, to lessor Schleier, the directors of the Bank being of the opinion that the income from the bank building would not thereafter suffice to meet the fixed charges thereon; and such stockholders' meeting was

duly held, on the 30th day of October, A. D. 1897; at which time, in consideration of the lessor releasing and discharging the Bank from its liability to pay the rents, taxes and assessments, then so in arrears, and to discharge and release the Bank from all further installments of rent thereafter to accrue under the lease, the stockholders authorized the surrender of the remainder of the leasehold term, together with the possession of the bank building, to the lessor, and due, written releases were mutually executed, exchanged, delivered between the Bank and the lessor in the premises, and duly recorded in the records of said Arapahoe county.

The surrender of the lease and bank building to the lessor was had and done in connection with proceedings instituted by the lessee Bank, looking toward a voluntary liquidation and winding up of its affairs, such liquidation, however, not being consummated prior to the appointment of the receiver, of date December 20, A. D. 1899.

The People's Savings Bank, heretofore referred to, becoming financially embarrassed, made an assignment of its assets to one F. J. Spencer, as assignee, who thereafter, in June, 1897, brought an action, in behalf of the Savings Bank, against the lessee National Bank, and on November 30, 1899, recovered a judgment against it, in such action, for the sum of four hundred and seventy-five thousand eight hundred twenty-five and seventy-one one hundredths ($475,825.71) dollars, and the present suit by the receiver of the lessee National Bank is prosecuted by him for the sole use and benefit of the said assignee of the People's Savings Bank, as such judgment creditor of the lessee National Bank; the prayer of the bill, in effect, being:

> a. That the said lease from appellee Schleier to the appellant National Bank, together with the subsequent surrender of such lease and the bank

building, should be respectively adjudged null and void, as *ultra vires* acts and transactions on the part of the appellee National Bank.

b. That an accounting should be had against appellee Schleier for the moneys of the bank expended in the construction of the bank buiding, and that the amount of such moneys should be declared a first and prior lien and charge upon the bank building, and also upon the demised real estate upon which it was constructed, and that said land and building should be jointly sold for the payment of the decree, upon such accounting.

Ignoring mere statements of legal conclusions contained in the bill, the foregoing contains a complete synopsis of all material facts averred in that pleading:

A demurrer to the bill was interposed by the defendants, appellees. The demurrer was sustained and final decree entered, dismissing the bill, which decree was affirmed, on appeal, by the Circuit Court of Appeals, and the case is now in this court on appeal from such judgment of affirmance.

Leave to file an amended bill of complaint was denied in the Circuit Court. Such amended bill, however, was not tendered, or leave to file the same asked, until more than thirty days had elapsed subsequent to the rendition and entry of the final decree dismissing the original bill. The correctness of the action of the Circuit Court in refusing to allow the amended bill to be filed, is here challenged by appellant, and we will hereafter address ourselves to the question of whether such refusal is subject to review on this appeal, or furnishes adequate cause for reversal.

Before entering upon a discussion of the legal propositions involved in the pending appeal, we desire to direct the attention of the court to the following matters, which, un-

der the principles of equity pleading and legal presumptions proper to be indulged in, are impliedly admitted, by reason of the failure of the appellant to aver the existence of a contrary state of facts in his bill, viz.:

a. That appellee National Bank was *solvent* when the lease was made, and so continued until the bank building was fully completed and paid for, and for a period of more than two years and a half thereafter.

b. That no part of the moneys of the Savings Bank (being the sole creditor represented by the appellant receiver) was used for or in the construction of the bank building.

c. That such Savings Bank was not a creditor of the appellee National Bank at the time of the making of the lease and construction of and payment for the bank building, and did not become such creditor until long *subsequent* to the consummation of each and all of said transactions.

d. That every creditor of the National Bank, whose claim existed or had its initiation prior to the execution of the lease, or prior to the completion of the bank building and the payment of the cost of construction thereof, has been paid in full.

e. That each and every stockholder of the National Bank authorized and consented to the entering into and execution of said lease and each and every of its terms and provisions; and also consented to and authorized the construction of the bank building and payment of the cost thereof.

f. That the construction of the bank building did not render or cause the National Bank to be-

come insolvent, or in anywise impair its *then* capital.

g. That prior to the execution of the lease, or, at least, prior to the completion of the bank building, the National Bank had duly increased its capital stock, pursuant to the provisions of the national banking act in that behalf, to such extent that each and all of the obligations or covenants assumed by the Bank under the lease could have been fully complied with, without contravening either the letter or spirit of the national banking act, touching the limit of indebtedness which might be lawfully incurred by it.

h. That neither the execution of the lease and the construction of the bank building nor the surrender of the lease was tainted with any fraud or unconscionable conduct on the part of either lessor or lessee.

i. That, as a business proposition, the lease appeared to be an advantageous one for the Bank to enter into and assume the obligations imposed thereby, in the light of surrounding circumstances and prospects then existing and reasonable to be anticipated.

j. That the value of the demised term, at the time of the execution and delivery of the lease, was an adequate compensation for the payment of the stipulated rent and the money required to be expended in the improvement of the property, as real estate values then existed in the city of Denver and were then reasonably expected to continue.

k. That the government of the United States, through the comptroller of the currency, at whose

instance this suit is brought, knew of the existence of the lease practically contemporaneous with its execution, and the moneys which were being expended in improving the demised premises, and approved the same.

l. That appellee, Schleier, as lessor, did not know, at the time of the execution of the lease, that the building required to be constructed upon the demised premises would ever be used by the lessee in any manner or for any purpose contrary to law; and further, was not then aware of the fact that a building of the character and dimensions called for by the lease would not, in fact, be necessary or required for the legitimate transactions of its banking business by the lessee National Bank.

m. That said lessor was justified in presuming, at the time of the execution and delivery of said lease, that the amount of the *then* capital of the lessee Bank was sufficient and adequate to meet and satisfy all of the obligations and indebtedness assumed by the lessee Bank under the lease, without contravening any of the provisions of the national banking act, with reference to the incurring of indebtedness by said Bank.

n. That the said People's Savings Bank, *real plaintiff herein*, at the time it began to extend credit to the National Bank, had full knowledge of the existence of the lease and of the construction and cost of the bank building.

o. That the Savings Bank had full notice of the intention of the National Bank to surrender the lease and the bank building, and acquiesced in said surrender.

p. That the true and actual value of the demised premises, on the date the lease was executed and delivered, was then equal to, if not in excess of, the *market or cash value* of the said premises with the bank building thereon, on the date (over eight years thereafter) when said lease, by mutual agreement of said lessor and lessee, was surrendered and possession of the land and building delivered to the lessor.

q. That the leasehold interest surrendered by the lessee to the lessor, including the bank building upon the demised premises, was not possessed of any marketable or assignable value whatsoever on the date of such surrender, charged, as such leasehold interest was, with the obligations on the part of the lessee, or its assigns, to pay rent and other fixed charges in arrears, and the continuing obligation to pay future rent, taxes and other fixed charges, as the same should thereafter accrue.

r. That the depreciation in value of the demised term, between the date of the execution of the lease and the construction of the bank building, and the date when such lease and bank building were surrendered to the lessor, was owing to causes and conditions over which neither the lessor nor the lessee had any control, or could have originally foreseen, namely: decline in real estate values, arising from divers general or local causes.

s. That the temporary financial embarrassment of the lessee Bank, which occurred in the summer of *1893*, resulting in a receivership lasting about *one month*, was not occasioned by any of the transactions complained of, but was proximately attrib-

utable to the widespread, disastrous panic of that year, when failure and receiverships of banking institutions throughout the country was the rule, and escape therefrom the exception.

It is manifest, from the foregoing, that the supposed equities upon which this suit are based are wholly and solely founded upon the theory that the making and entering into of the lease in question was, *ab initio*, an *ultra vires act* upon the part of the lessee Bank, and the moneys expended by it in the construction of the bank building, therefore, recoverable in this suit, and the land itself upon which the building was constructed may be charged with a lien and sold for the re-payment of the moneys so expended, it being contended that an equitable right to such relief results as a necessary sequence from the alleged original invalidity of the lease.

That this is a correct concept of the bill of complaint is borne out by the fact that the prayer for relief does not ask for a restoration to complainant of the leasehold interest, charged with its obligations, coupled with the further circumstance that the bill does not allege any state of facts from which a violation of the national banking act would appear, with reference to unlawful preferences by an insolvent national bank of one creditor over another in the matter of the surrender of the lease and building.

LAW OF THE CASE.

The theory upon which appellant seeks to recover, and upon which a reversal of the final decrees of the Circuit Court and the Circuit Court of Appeals is based, may be thus stated:

First. That the making and entering into of the lease in controversy was an *ultra vires* act upon the part of the National Bank, because:

a. A national bank is not authorized to take a lease of real estate running for a longer period than its corporate existence, even though the purpose of the lease is to enable the bank to construct and maintain a suitable bank building upon the demised premises for the transaction of its banking business.

b. The aggregate amount of rent for the full demised term constituted an indebtedness, exceeding the amount of the capital stock of the lessee Bank, as such capital was *originally* fixed in its organization certificate.

c. A national bank, in taking a lease of real estate upon which to construct a bank building for the transaction of its ordinary business, is not authorized to enter into a covenant requiring it to construct a building of any specified cost or dimensions, such building, when constructed, to become a part of the realty upon which it stands.

d. Inasmuch as the lessee National Bank voluntarily constructed a bank building upon the demised premises larger than was necessary for its immediate accommodation in the transaction of its banking business, and sub-let, for profit, the portion of the building not then required by it for banking facilities, and, further, as the moneys expended by the Bank, in the construction of such building, exceeded three times the requirements of the lease in

that behalf, and was also slightly in excess of the amount of its *original* capitalization, the transaction, as a whole, became *ultra vires* and void.

Second. That appellant receiver, in this suit, directly represents the United States in its sovereign capacity, and in such capacity the receiver may successfully attack any alleged *ultra vires* transaction or contract entered into by the appellee National Bank *at any time* during its entire corporate existence, even though at the time the particular contract or transaction was made, or had, the Bank was then solvent and had no creditors, and even though every stockholder of the Bank assented to the transaction or contract complained of.

While appellant does not state the foregoing propositions, in the order or exact form as above given, yet a careful examination of the brief and argument of his counsel will disclose that we have accurately expressed the chief and principal contentions upon which his case must stand or fall.

The propositions upon which *appellees* rely as decisive of this appeal in their favor may be thus stated:

First. That the lease entered into between appellee Schleier and the appellee Bank, was not an *ultra vires* act, in the proper sense of that term, neither was it an abuse or misuse of corporate power.

Second. That defendant Schleier had a right to rely upon the presumption that the lessee Bank

was taking the lease in good faith, for the sole purpose of constructing a building to be used for legitimate banking purposes, and that, during its corporate existence, the lessee would require a bank building of the size and cost stipulated in the lease, for such uses.

Third. That the lessor, Schleier, is in nowise accountable or at fault, because of the fact that the Bank lessee saw proper to voluntarily construct a building upon the demised property exceeding in dimensions and cost that called for by the lease, nor because the lessee saw proper to sub-let portions of said building, after its construction.

Fourth. That if the corporate power of the lessee Bank to enter into the least in controversy is, in any respect, questionable, the transaction would, at most, amount to a mere misuse or abuse of express corporate authority, and not a total want of power with reference to the subject-matter; and for such misuse or abuse of corporate power (if any), the government of the United States, through a suit brought directly in the name of the comptroller of the currency, under the provisions of section 5239 of the Revised Statutes of the United States, could alone complain, and the judgment authorized by such section would only extend to the forfeiture of the Bank's charter.

Fifth. Even if the entering into of the said lease should be regarded as an *ultra vires* act, on the part of the lessee Bank, in the most extreme sense in which such term is understood, nevertheless, the lessor, having complied with every provision employed in that instrument to be by him performed, the transaction having been fully *executed* upon his part,

and he never having attempted to repudiate or, in any manner, violate the terms or provisions of that instrument, there is no principle of equity jurisprudence, which would authorize the rendition of a decree against him for moneys expended by the lessee in the construction of the bank building.

Sixth. Even though the court should be of the opinion that the entering into of the lease and the various acts of the National Bank in the improvement of the property and the subsequent use thereof, were each and all *ultra vires*, the present plaintiff, as receiver of the lessee Bank, can not be heard to complain, because in this suit he merely represents a *subsequent* creditor, whose claim arose long after the making of the lease and the construction of the bank building and payment therefor.

Seventh. Even if the receiver were to be treated in this suit as the representative of the government, in its sovereign capacity, and the transactions complained of be regarded as *ultra vires* in the proper sense, no relief of the character demanded in the bill could be granted, because the visitorial power of the United States is strictly confined, under the provisions of sections 5239 and 5241 of the Revised Statutes of the United States, to a forfeiture of the franchises of a national bank for violation of any one or more of the provisions of the national banking act.

Eighth. The lessor and lessee, in good faith and for valuable considerations, having compromised, adjusted and released their respective rights and liabilities growing out of or founded upon the transactions complained of, more than two years before the commencement of this suit—the like period intervening

before the insolvency of the Bank was declared by the comptroller and the appointment of a receiver—and no fraud or fraudulent purpose being charged in the premises—the validity of the lease is not now open to attack, even though, as an original proposition, such instrument *might* have been assailable on the ground of *ultra vires*.

The learned opinion of the Circuit Court of Appeals, in this case (Transcript of Record, pages 104-111), is probably sufficient in itself to render any extended argument by us superfluous, and it is only by way of superabundant caution that we venture to elaborate upon the views there expressed.

I.

THE APPELLANT RECEIVER IS THE MERE REPRESENTATIVE OF THE SAVINGS BANK (A CREDITOR), AND HIS RIGHTS, AS COMPLAINANT, ARE LIMITED TO THOSE POSSESSED BY IT.

The receiver in this suit does not represent the government in any respect or capacity whatsoever. He represents, and can enforce, only such rights as the assignee of The People's Savings Bank might properly urge, if such assignee were the plaintiff.

The status of a receiver of a national bank, appointed (in the present instance) by the comptroller of the currency, under the provisions of the national banking law, has been frequently the subject of judicial consideration.

In Casey, Receiver, vs. Society, etc., 2 Woods', C. C., 84, the subject was thus treated:

> "The receiver holds only the estate and title of the bank in its assets; his title is the same as that of

an assignee in bankruptcy. * * * An assignment in bankruptcy, like any other assignment, by operation of law, places the rights of the bankrupt precisely in the same plight and condition as he possessed them, subject to all equities. (Citing several cases.) There seems to be no reason why the position of a receiver of an insolvent bank, under the currency act, is any better than that of an assignee in bankruptcy."

And, in section 359, High on Receivers, the rule thus expressed is declared to be "the true doctrine."

Mr. Justice Gray, in Price vs. Abbott, 17 Fed., 506, 509, in speaking of suits instituted by receivers of insolvent national banks, remarked that such suits were brought "for the exclusive benefit of its creditors."

In Kennedy vs. Gibson, 8 Wall., 498, 506, this court said:

> "The receiver is the statutory assignee of the association * * * he represents both the creditors and the association."

In Case vs. Terrell, 11 Wallace, 199, 202, it was held, the receiver of a national bank represents the bank, its stockholders and creditors, but that such officer does not, in any sense, represent the government; and, in Scott vs. Armstrong, 146 U. S., 499, 507, Mr. Chief Justice Fuller, speaking for the court, said:

> "The receiver took the assets of the Fidelity National Bank as a mere trustee for creditors, and not for value and without notice; and, in the absence of statute to the contrary, *subject to all claims and defenses that could have been interposed as against*

the insolvent corporation before the liens of the United States and of the general creditors attached."

In Fourth Street National Bank vs. Yardley, 165 U. S., 634, 653, this court, speaking through Mr. Justice White, in express terms, again affirmed the doctrine thus stated in Scott vs. Armstrong, *supra*, adding:

> "As the Fourth Street Bank contracted * * * on the faith of the representations of the Keystone Bank * * * and the fund which came into the hands of its *voluntary assignee* (receiver) is the fund, as to which the representations were made, the Keystone Bank and its *assignee* are, in equity, estopped, etc."

Here the court, in unequivocal terms, announced that the receiver of an insolvent national bank simply occupied the status of a voluntary assignee, and that such receiver is, in equity, estopped whenever the bank, which he represents, would be subject to the like doctrine.

A receiver is a mere statutory officer and derives his sole authority from the statute creating the office. It is axiomatic that such officer posseses no inherent or general powers whatsoever. His authority is such only and no more than the statute, in express terms, confers upon him, coupled with such implied powers as are essential to carry out the authority explicitly conferred.

The statutory powers of the receiver are thus expressed:

> "He (receiver) shall * * * under the direction of the comptroller * * * take possession of the books, records and assets of every description

of such association, collect all debts, dues and claims *belonging* to such association."

Sec. 5234, U. S. Rev. Stat.

It will be observed, in the enumeration of the powers thus conferred, the right to sue or the capacity to be sued is not directly conferred upon the receiver. His right to maintain an action arises solely by implication from the express power, to collect all debts, dues and claims "belonging" to the bank. The absence of such express authority to sue was commented upon by this court in Bank of Bethel vs. National, etc., Bank, 14 Wall., 383, 399-400, where Mr. Justice Clifford said:

> "Neither power to sue nor to be sued * * * is anywhere in terms conferred upon the receiver, nor upon the comptroller of the currency in any case except when he institutes a suit to forfeit the rights, privileges and franchises of the association, and in that case the provision is express that the suit shall be in his own name."

II.

THE POWERS OF THE APPELLANT RECEIVER, WHICH ARE FIXED BY STATUTE, ARE TO BE STRICTLY CONSTRUED, BECAUSE IT IS A CARDINAL RULE, IN THE CONSTRUCTION OF STATUTES, THAT STATUTORY POWERS ARE TO BE STRICTLY CONSTRUED.

Thus Mechem on Public Officers, section 511, remarks:

> "Express grants of power to public officers are usually subjected to strict interpretation, and will be construed as conferring those powers only which are expressly imposed or necessarily implied."

This rule justifies a holding that the receiver can not maintain an action under conditions or circumstances where the banking association, he represents, would be debarred or precluded from a recovery on a similar state of facts.

This view is supported by High on Receivers, section 315, where the rule is announced that with the exception of conveyances made with the specific intent to defraud creditors, a receiver can assert no rights which could not be successfully litigated by the corporation he represents.

In Smith on Receiverships, section 255, the rule is thus expressed:

> "The powers of a receiver of a national bank are much more limited than those applicable to receiverships of corporations generally."

For the purposes of this litigation, however, we are willing to concede that a receiver of a national bank is impliedly clothed with power to attack the contracts or dealings of the bank, whose assets he is administering, when such contracts or transactions were entered into by the bank when it was in a condition of *insolvency*, with the view and intent of either defrauding its *existing* creditors, or of unlawfully preferring creditors, in violation of section 5242, U. S. Rev. Stat. The contention that the receiver is vested with any other or greater powers with reference to questioning contracts or transactions of the bank is unsupported by authority and untenable in principle.

Section 5241, Rev. Stat., reads:

> "No association shall be subject to any visitorial powers other than such as are authorized by this title, or are vested in the courts of justice."

The only visitorial power conferred by the national bank statutes is contained in section 5239, which provides that upon a violation of any of the provisions of the act, the franchises of the bank may be forfeited in a suit brought for that purpose directly by the comptroller of the currency in his own name, coupled with the imposition of a *personal* liability upon such of the directors of the bank as participated in or assented to the violation of the act, in favor of shareholders, or others, who may have sustained injury thereby.

The most that can be said in favor of the power of the receiver in the present suit, is that he represents the insolvent Bank and its creditors, and in behalf of the latter, he is not clothed with any other or greater powers than is ordinarily vested in assignees in bankruptcy. The government of the United States, in its sovereign capacity, is not before the court as a litigant, nor in any manner represented, and even if it were, the only judgment which it could ask would be one of forfeiture of the franchises of the Bank. It is not the province, nor the duty, of the government to enforce, either at law or in equity, the payment or satisfaction of the debts or obligations of a national bank to its creditors.

The underlying principle which controls, even in a suit where the government *co nomine* is complainant, debars the receiver from a recovery, when the creditor he represents could not maintain a like suit. It is thoroughly settled in this court, that though a suit be prosecuted in the name of the United States, yet, if all the avails of the litigation will result to the exclusive benefit of a private person, the principles which will be applied in such suit are the same, without qualification, as if the controversy were wholly between private ligitants.

Thus in United States vs. Beebe, 127 U. S., 338-347, Mr. Justice Lamar, speaking for the court, said:

> "The mere use of its (United States) name in a suit for the benefit of a private suitor can not extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party; nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants."

For other decisions of this court in line with the foregoing, see:

New Hampshire vs. Louisiana, 108 U. S., 76.

Maryland vs. Baldwin, 112 U. S., 490.

United States vs. Des Moines, etc., Co., 142 U. S., 510.

Curtner vs. United States, 149 U. S., 662.

United States vs. Bell Co., 167 U. S., 224.

It follows logically from the foregoing premises, that if a *subsequent* creditor (whether corporate or individual) can not be heard to question the contracts or acts of his debtor, which were had and entered into before the relation of debtor and creditor existed, then the receiver in the present suit stands in no better position and possesses no other or greater rights than the particular creditor he represents.

If such creditor, personally, can not legally complain, a new cause of action is not created by the mere fact that the assets of the debtor have passed into the hands of a statutory assignee, whom the statute, in the present instance, designates by the name of receiver.

III.

CHARACTER OF TRANSACTIONS ASSAILABLE BY AN ASSIGNEE IN BANKRUPTCY, OR BY CREDITORS GENERALLY.

Having demonstrated, as we assume, that a receiver of an insolvent national bank possesses no greater powers or interest, with reference to the claims or assets of the bank, than is ordinarily the case with reference to like powers in the case of an assignee of a bankrupt, we will refer to the principles which have been firmly established in the federal courts, both supreme and inferior, on this subject.

In the early case of Mitchell vs. Winslow, 2 Story, C. C., 630, 637, it was there said by Mr. Justice Story:

> "It is a well established doctrine that (except in cases of fraud) assignees in bankruptcy take only such rights and interests as the bankrupt himself had and could himself claim and assert at the time of his bankruptcy, and consequently they are affected with all the equities which would affect the bankrupt himself, if he were asserting these rights and interests."

The same doctrine was expressly affirmed by this court in Yeatman vs. Savings Society, etc., 95 U. S., 764, 766, and in Cook vs. Tullis, 18 Wall., 332, 341, where Mr. Justice Field, speaking for the court, remarked:

> "If we * * * treat the case as one of simple *misappropriation* of property, still the trustees (in bankruptcy) must fail in their suit. They took the property of the bankrupt, subject to all legal and equitable claims of others. They are affected by all the equities which could be urged against him."

In Warren vs. Moody, 122 U. S., 132, 137, an assignee in bankruptcy sought the cancellation of a voluntary conveyance, executed by the bankrupt to his daughter, the grantor, at the time of the conveyance, having existing creditors, though not insolvent. The assignee represented such *existing* creditors in the effort to vacate the conveyance.

In holding that no recovery could be had, the court, *inter alia*, said:

> "The deed to the daughter being honest in fact and in intent, * * * and being valid as between her parents and herself, and no fraud in fact, or intent to commit a fraud, or to hinder or delay creditors, being alleged in the bill, the case is not one in which these plaintiffs can set aside the deed, as being a deed of 'property conveyed by the bankrupt in fraud of his creditors,' even though the conveyance may have been invalid, under the statute of Alabama, as against the creditors named in the bill, because it was a voluntary conveyance. Those creditors, whatever remedies they may have had to collect their debts, are not represented by the plaintiffs, as assignees in bankruptcy."

See, also, Adams vs. Collier, 122 U. S., 382, 390, 391, where it was expressly held that though a grantor was insolvent when he made a conveyance, there being no fraud intended in the making thereof, the assignee in bankruptcy of the grantor had no standing to impeach the conveyance, the court saying, in this behalf:

> "The deed was good as between the grantor and his children; and, in the absence of fraud, could not

be questioned by the assignee, who took only such rights as the bankrupt had."

And in Scott vs. Armstrong, 146 U. S., 499, from which we have already quoted, the same principles were announced, with reference to a suit by the receiver of an insolvent national bank.

These authorities would seem to be conclusive upon the proposition that a receiver of an insolvent national bank can never maintain a suit to enforce alleged claims of the creditor he represents, where, upon the facts, the bank itself would be barred, precluded or estopped from maintaining a like suit; with the possible exception of instances where the conveyance, contract or transaction assailed was made, had or entered into by the bank, when in a condition of insolvency, and with the actual intent to hinder, delay or defraud creditors, or where the bank made an illegal disposition of its assets after committing an act of insolvency with a view of illegally preferring some of its creditors to the injury of others, as expressly prohibited by the provisions of the national banking act.

In the present litigation it is clear beyond a peradventure, that the appellee Bank would have no standing in equity to maintain the present suit, as the bill does not attempt to charge that there was any fraudulent purpose upon the part of either the defendant lessor, or the defendant Bank, to hinder, delay or defraud creditors, in the entering into of the lease in controversy, nor is it charged in the bill that the appellant receiver represents any creditor or creditors whose claims were in existence at the time either when the lease was made or when the bank building was constructed and fully paid for. Moreover, no facts are charged in the bill which disclose any violation, either in letter or

spirit, of the national banking act, prohibiting illegal preferences of creditors.

In passing from this branch of the discussion, we may further remark that no well-considered case can be found, distinctly recognizing the right of a receiver of an insolvent national bank to recover money or property paid out or expended by the bank, under an *ultra vires* contract (actual fraud apart), where the circumstances of the case were such that the bank itself would have no standing as a litigant, to recover such money or assets.

We might, therefore, concede, arguendo, that the execution of the lease and the expenditure of moneys by the bank, in the improvement of the leased property, were each and all *ultra vires*, to the full extent contended for by appellant, and at the same time successfully insist that appellant, in his official capacity, as receiver, has no legal standing to maintain this suit.

IV.

SUBSEQUENT CREDITORS, OR A RECEIVER OR ASSIGNEE REPRESENTING THEM, CAN NOT MAINTAIN SUITS IN EQUITY TO RECOVER MONEY OR PROPERTY OF THEIR DEBTOR EXPENDED OR PAID OUT BEFORE THE CLAIMS OF THE CREDITORS AROSE, EVEN THOUGH SUCH MONEYS OR PROPERTY WERE PARTED WITH BY THE DEBTOR WITHOUT CONSIDERATION, OR, IN THE CASE OF CORPORATIONS, UNDER ULTRA VIRES CONTRACTS.

Among the multitude of authorities which might be cited in direct support of the proposition thus stated, we refer to the following:

Central Trust Co. vs. Columbus, etc., Ry. Co., 87 Fed., 815, 824.

Graham vs. Railroad Co., 102 U. S., 148, 154.

Porter vs. Pittsburgh Bessemer Steel Co., 120 U. S., 649, 673.

Ayres, etc., vs. Dorsey, 70 N. W., 111, 112.

Hamilton vs. Menominee Falls Quarry Co., 81 N. W., 876, 879.

2 Morawetz on Corporations, sections 707, 800.

5 Thompson on Corporations, section 6030.

Taylor on Private Corporations, section 280.

Central Trust Co. vs. Worcester Cycle Co., 110 Fed., 491, 493.

Allis vs. Jones, 45 Fed., 148, 150.

Continental Trust Co. vs. Toledo, etc., Co., 82 Fed., 642, 656.

Fidelity Co. vs. West Penn., etc., Co., 138 Pa. State, 494.

These authorities are conclusive in favor of the proposition that, if the moneys of the National Bank expended in the improvement of the demised premises and sought to be recovered in this suit, can be properly treated as outlays made under an *ultra vires* contract, nevertheless the plaintiff receiver of the Bank cannot maintain this suit because the single creditor whom he represents, is not averred in the bill, to have been such creditor prior to or contemporaneous with either the making of the lease, or the expenditure of the moneys sought to be recovered, coupled with the further circumstance that there is no pretense or claim that such lease was entered into or the moneys applied, with the view or intent of defrauding, hindering or delaying any *future* creditors of the Bank.

V.

THE PROPERTY OF A SOLVENT NATIONAL BANK, OR OTHER CORPORATION, IS NOT IMPRESSED WITH ANY TRUST IN FAVOR OF FUTURE CREDITORS, HENCE A TRUST OR EQUITY DOES NOT ARISE IN FAVOR OF SUBSEQUENT CREDITORS OF A SOLVENT BANK OR CORPORATION, BY REASON OF IMPROPER OR UNAUTHORIZED EXPENDITURES OF CORPORATE MONEYS, MADE BY SUCH BANK OR CORPORATION WHILE SOLVENT.

The dominant idea upon which this suit is brought, and upon which its successful maintenance must necessarily rest, may be thus stated:

1. The expediture of its moneys by a national bank in carrying out the provisions of an *ultra vires* contract, is a void and illegal act.

2. Such expenditure of corporate moneys constitutes a misappropriation and unlawful application of trust funds.

3. The assets of a solvent corporation constitute a trust fund in favor of its creditors and shareholders.

It will be seen at a glance that each and every of the foregoing postulates must be accepted by the court as legal axioms before even a semblance of a cause of action is made out by the averments in the bill. If the alleged trust be found non-existent, then appellant's entire case falls for the want of a foundation or basis upon which to rest; and we assert, with justifiable confidence, that this court is irrevocably committed to the doctrine that the property of a solvent corporation is never impressed with any character of trust, even in favor of its existing, and never in favor of subsequent creditors.

In Graham vs. Railroad Co., 102 U. S., 148, 153, 154, 161, the court, through Mr. Justice Bradley, reviewed at length the status of subsequent creditors with reference to prior voluntary conveyances made by the debtor, together with the question whether said subsequent creditors would have any standing to attack previous conveyances made by the debtor, wherein the debtor was defrauded by the grantee; and the court held that such subsequent creditors could neither attack a voluntary conveyance made by the debtor before the credit arose, nor a conveyance of property by the debtor wherein actual fraud had been practiced upon him, the latter not seeing proper to rescind the conveyance; that in either case the subsequent creditor was not injured by the transaction.

On pages 160 and 161 the court specially considers the status of the assets of a corporation debtor, and the theory that the corporation holds its property as a trustee for the benefit of stockholders and creditors, is expressly repudiated. The court concluded with these observations:

> "We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each."

In Hollins vs. Brierfield C. & I. Co., 150 U. S., 371, the so-called trust fund doctrine was again considered and again discountenanced.

Mr. Justice Brewer, speaking for the court, *inter alia*, said:

> "Solvent, it (corporation) holds its property as an individual holds his, free from the touch of a creditor who has acquired no lien."

Further on in the opinion the following remarks, apropos of the pending controversy, were used:

> "A party may deal with a corporation, in respect to its property, in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien."

In Pullman's Palace Car Co. vs. Transportation Co., 171 U. S., 138, the facts were: The property and assets of the transportation company had been demised to the Pullman Company, under lease, which the court held was an *ultra vires* transaction for divers reasons wholly foreign to the case at bar; but in the course of the opinion, the court anew repudiated the idea that any character of trust relation arose by virtue of the change of possession of the corporate property, pursuant to the *ultra vires* contract, saying, on page 159 (italics ours):

> "There is no question of *trustee* in the case. The property was placed in its hands by the lessor, and in accordance with the terms of the agreement. It was not then impressed with any *trust*, according to any definition of that term known to us."

In other words, where the party receiving the property of a corporation, under an *ultra vires* agreement, neither repudiates the contract, nor attempts to disregard any of its obligations, no trust relation of any character would arise.

In McDonald vs. Williams, 174 U. S., 397, the facts were, that a solvent national bank, in direct violation of the provisions of section 5204, U. S. Rev. Stat., paid out certain of its capital to its stockholders in the form of dividends, a confessedly *ultra vires* act, in the most extreme sense of that term. The bank subsequently becoming insolvent, the receiver thereof attempted to recover the dividends so paid from the stockholders receiving the same. In again discountenancing the existence of any supposed trust-fund doctrine, the court, in the course of the opinion, remarked:

> "The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid, on the theory that they were paid from a trust fund, and therefore were liable to be recovered back."

In our judgment, these repeated rulings by this court effectually dispose of appellant's contention, that the moneys expended in the improvement of the demised premises constituted a trust fund, recoverable in this suit for the benefit of the Bank's creditors. No such trust exists, for the reason that the Bank was presumably solvent when it executed the lease and constructed and paid for the building, as *no averments to the contrary appear in the bill.* The claim of the Savings Bank, which the receiver represents, not being then in existence, both it and the receiver, in legal contemplation, are total strangers to the transactions now assailed, and hence there is an utter want of equity in the bill of complaint.

A recent decision by the Supreme Court of Wisconsin is in direct accord with the views of this court, with reference to the so-called trust fund doctrine. We refer to Marvin vs. Anderson, 111 Wis., 387, where the court remarked:

> "The rule under which, in any case, the property of a corporation is deemed a *trust fund* for creditors and stockholders, or either, is wholly a creation of courts of equity, and that only those have equitable rights in a fund at the time of its depletion who have *then* a right to resort to such fund to satisfy their claims. Creditors of a corporation are not presumed to have relied upon property of their debtor, which it did not possess when the indebtedness accrued, and therefore are not held to have any equitable claim thereon."

VI.

THE TRANSACTIONS HEREIN COMPLAINED OF BY APPELLANT WERE NOT ULTRA VIRES.

We now turn our attention to the question of whether the execution of the lease was an *ultra vires* act on the part of the lessee bank, in the proper sense of that term.

Ultra vires, in the true conception of the phrase, exists only where there is an *entire* want of power over the subject-matter of a given contract. Where authority exists to acquire a particular class of property, but such right is exceeded or abused in the given instance, as to amount or purpose, it is settled law in this court that no one but the government can be heard to complain, and the remedy is merely that of forfeiture of corporate franchises. As between the parties to the contract, where the corporation merely abuses

or exceeds its corporate authority, the defense or claim of *ultra vires* is unavailable.

Our present contention, however, is that, upon the facts stated in the bill, it does not appear that the appellee Bank even abused or exceeded its corporate authority; much less was it guilty of acting where a total want of power existed.

Among the express powers the national bank act vests in a banking association are the following:

> "To make contracts."
>
> Section 5136, Rev. Stat.

> "To purchase, hold and convey such real estate as shall be necessary for its immediate accommodation in the transaction of its business."
>
> Section 5137, id.

To these are to be added the implied power to lease or construct a suitable banking house in which to transact its usual business, pursuant to the provisions of section 5190, id.

Under the powers thus conferred by the federal statutes, we submit, the lease in question was a valid, lawful contract.

A liberal policy has always prevailed in this court, with reference to *incidental* powers of a corporation in the carrying out of the objects for which it was created:

See:

> Green Bay, etc., Co. vs. Union, etc., Co., 107 U. S., 98, 100.
>
> Ft. Worth Co. vs. Bridge Co., 151 U. S., 294.
>
> Navigation Co. vs. Hooper, 160 U. S., 514.
>
> U. P. Ry. Co. vs. C. R. I., etc., Co., 163 U. S., 564.

In all parts of the United States, national banks lease property for carrying on their banking business, and their power so to do has been recognized by the comptroller and upheld by the courts.

Schofield vs. Bank, 97 Fed., 282, 287.
McCormick vs. Bank, 165 U. S., 538.
Bank vs. Deposit Co., 161 U. S., 1.

As already pointed out, section 5137, U. S. Rev. Stats., vests a national banking association with the express power to "purchase, hold and convey" real estate for certain enumerated purposes.

It has frequently been decided that the term "purchase" properly includes the acquisition of a leasehold interest in realty.

Thus, in Hackett vs. Emporium, etc., 24 At., 627, 628 (150 Pa. St., 220), the Supreme Court of Pennsylvania decided:

> "The legal meaning of the word 'purchase' includes all modes of acquisition, except that by descent. A lessee is a purchaser as truly as he who becomes grantee in fee. The difference is in the estate acquired. The estate of the former is a leasehold, of the latter a freehold; but the mode of acquisition is by purchase in both cases."

In Spielmann vs. Kliest, 36 N. J. Eq., 199-203, it is said:

> "Is a lessee a purchaser?"

The court then refers to Blackstone's familiar definition of title by purchase, adding:

> "And among the instruments mentioned under the head of alienation, by which a right to the possession of lands may be acquired, leases are enumerated. 2 Blackstone Com., 310. And Cruise says that every lessee is a purchaser by his contract and covenants. 1 Greenlf., Cruise, 403, chapter 1, paragraph 80."

See, also, Smoot et al. vs. Legatt, 1st Stewart (Ala.), 590, 598, where Judge Saffold, speaking for the Supreme Court of that state, said:

> "The term purchase is appropriate either to the conveyance of a *lease* or *fee*." (The italics are those of the court.)

The authority of the Bank to take a lease of real property for the construction thereon of a suitable bank building is, therefore, not open to reasonable question.

The word "necessary," as used in the national banking act, in reference to the amount of realty which a national bank may acquire for banking purposes, or the size or cost of the banking building that it may erect, is to receive a liberal and not a narrow construction.

In this connection, see the remarks of Chief Justice Marshall, in McCulloch vs. State, 4 Wheat., U. S., 316, where he says, in effect, that the word "necessary" is a comparative term, without any fixed or restricted meaning.

The question then arises whether or not the right to make this lease and construct the bank building was incidental to the objects for which the defendant National Bank was created. If this is answered in the affirmative, it follows that such transactions were not even in excess of or an

abuse of the Bank's powers, as conferred upon it by the statute.

A building, for instance, which would be deemed necessary, that is, reasonably convenient, by a bank, for its business in a city, might not be deemed necessary in a country town. Regard should be had to the fact that national banks, in order to properly discharge their functions to the public, must have their banking houses conveniently located with reference to the heart of the business locality in the town or city where they may be engaged in doing business.

Common usage and long acquiescence by the government has tacitly recognized the right of national banks to do business in the larger and more expensive buildings located in the commercial centers of the country; where a building such as is commonly used for banking purposes can not be rented, the bank perforce must build. If desirable ground can not be purchased outright, then it must be leased; and the lessor of property situate in the heart of the traffic section of the city would naturally object, as a business proposition, to an inexpensive or shabby building being constructed upon his property for a long term of years.

Suppose, for illustration, that a banking institution should buy or lease a plot of ground which was surrounded on either side by large costly structures. Is it the policy of the law, under such circumstances, that the bank should be compelled to build a structure not to exceed, say, one story in height, merely because a building of that dimension was all that was absolutely essential or indispensably necessary to enable it to contain its present vaults, store rooms and banking offices? Common sense would say "no," and yet, if the bank constructs a building in keeping with other structures in the immediate neighborhood, and furthermore, in appearance similar to those occupied by other banking institu-

tions of a like character, it must, of necessity, be permitted to rent the surplus rooms until such time as the growth of the business of the bank may necessitate the use of the entire building. In short, the right to construct or rent a building of such size, appearance, and situate in such a locality as is usual and customary for national banks in good standing to occupy, together with a right to lease the unused portion of such building, must be regarded as "incidental" to the right to acquire and hold real estate for banking purposes. The rent which the bank receives for the unused portions of the building in a measure reimburses it for the outlay in the original construction, and when that is the sole purpose for which such rooms are rented, the spirit of the law can not be said to be violated under those circumstances.

Any other construction would impose upon the courts the duty of enjoining or restraining national banks from constructing or renting buildings for banking purposes in excess of what the court might be of the opinion was absolutely indispensable for the needs of the bank. It is fair to presume that the directors of the People's National Bank, and the comptroller of the currency, considered the lease in controversy as the very best possible arrangement that the Bank could make, in order to obtain suitable quarters for its business.

We believe, therefore, that a wide discretion was designed to be vested in the board of directors of national banks, with reference to the size, character and locality of the buildings which they might construct or acquire for banking purposes. Where the bank does not engage, or attempt to engage, in any other business than that of legitimate banking, the mere fact that it rents the unused portions of its banking building, so as to thereby reimburse itself for the moneys necessarily expended in the construction of a building such

as is usually and generally occupied by banking institutions throughout the country, no violation of law is thereby committed.

There is nothing in the law which limits the rental the bank shall pay, or the cost of the building it shall occupy. If Congress had intended to allow no discretion to national banks as to the rentals they should pay or the price they should give for the purchase of their banking houses it would certainly have been a very easy matter for it to have done so. There was no requirement in the lease that the building should cover the whole of the leased ground. All it required was a four-story building. It did not require the expenditure of $305,000, but only of $100,000. Many national banks throughout the country own buildings, part of which they occupy and part of which they rent, far larger as to size and far more expensive as to construction than the building provided for in the written lease between the People's National Bank and Mr. Schleier.

This court, in the leading case of Bank vs. Matthews, 98 U. S., 621, 626, 629, in announcing the general rule that violations of the national banking act in the matter of contracts entered into by a national bank, were subjects which could not be inquired into by any one except the government, and then only in a suit to obtain a forfeiture of the charter of the corporation, referred with approval to Leazure vs. Hillegas, 7 S. & R., 313, remarking of this case:

> "This authority is elaborate and exhaustive upon the subject."

Now, if we turn to the case of Leazure vs. Hillegas, we find it decides that, under a bank act and under a charter which authorized a bank to have, hold, purchase, etc., lands, etc., provided such lands and tenements should only

extend to such lot or lots of ground and building as it might find "necessary" to carry on the business of said bank, etc., and should actually occupy, that a purchase by a bank was good, though it related to lands in a distant county which the bank did not occupy.

In the principal case, this court also cited with approval The Banks vs. Poitiaux, 3 Randolph, 136, the court in the latter case saying:

> "The Bank of Virginia and the Farmers' Bank of Virginia, finding it expedient to erect buildings in the city of Richmond for the transaction of their business, purchased a piece of ground for that purpose, and erected the buildings. After this was done there remained a vacant space on each side of the bank buildings, on which they determined to erect fire-proof brick houses for the greater security of the banks, and to sell them out to individuals.
>
> "The charters of the Bank of Virginia, and of the Farmers' Bank, after authorizing them to purchase, hold and enjoy lands and tenements, goods and chattels, to a specified value, and sell and dispose of them, provided that the lands which it shall be lawful for them to hold shall be only such as shall be requisite for their 'immediate accommodation,' etc., or acquired in satisfaction of debts, etc. * * * It is insisted that the lands which the banks sold to the appellee were not acquired in satisfaction of debts, etc., and were not requisite for their immediate accommodation, etc., according to the charters; and that, therefore, the banks could not acquire any title to such land, and could not convey any title to the purchaser from them; or if they could,

that as the purchase and sale were contrary to the policy of the law, a court of equity *ought not to assist them by enforcing the contract.*

"It seems to me that *the charters are only directory in this respect. They interpose no penalty in terms. They do not declare the purchase by, or conveyance to, the banks, to be void, nor vest the title in the commonwealth, or any other than the banks, in consequence of such purchase and conveyance. The legal title passed to the banks by the conveyance to them, and their conveyance would effectually transfer the title to any other. If, in making the purchase of the land in question, the banks violated their charters, the corporation might for that cause be dissolved by a proceeding in a suit by the commonwealth.*

"This case does not fall within the principle of Wilson vs. Spencer, 1 Rand., 76. In that case an association of individuals dealt in a manner utterly prohibited by law, and a contract founded on those unlawful dealings was declared to be void.

"In this case *the statutes do not prohibit the purchase of real property by the banks; but only limit the extent of such purchases; and the question, whether they have or have not exceeded the limits prescribed to them, is not fit to be tried in this suit, and at the instance of this party.* But if it were the duty of the court to inquire, in this case, whether the banks had, in the purchase in question, exceeded the limits prescribed by their charters, I should say *they had not.* If they had kept the ground not covered by their banking houses, for gardens, they could not have been charged with a violation of their

charters; and, using it in a way to secure the banking houses against fire, was equally innocent, although they combined with that object the other of getting a reimbursement, in part, of the cost of the land."

The case last cited is peculiarly in point, because it construes the words, "requisite for their immediate accommodation," which are in meaning the same as "necessary for its immediate accommodation," found in the national banking act, and the construction given such terms is not the narrow one contended for herein by appellant's counsel.

Nor is the objection, that a national bank can not lawfully take a lease of real property for the purpose of constructing thereon a bank building, when the leasehold term exceeds the period prescribed for the corporate existence of the bank, tenable. The point is fully discussed in the opinion of the Court of Appeals in this case.

See transcript of record, page 107, and authorities cited. The reasoning there advanced and cases noted render unnecessary any further discussion of this particular proposition.

The further objection, that the aggregate amount of rentals stipulated to be paid for the use of the demised premises, constitutes an indebtedness or liability in excess of the limitations imposed by the national banking act, is also fully answered by the reasoning, and authorities cited in the same opinion, record, page 108, to which reference is hereby made. If the court desires to examine other authorities upon the same subject, see

MacBean vs. Fresno, 112 Cal., 159.
Smith vs. Dedham, 144 Mass., 177.
Saleno vs. Neosho, 30 S. W., 190.
Woods vs. Oklahoma, 37 Pac., 1094.

In re Mahler, 105 Fed., 428-30.
Bosler vs. Kuhn, 8 Wat. & S., 183.
Dallas E. Co. vs. City of Dallas, 58 S. W., 153.
Budd vs. Budd, 59 Fed., 735.
City of Dawson vs. Dawson Co., 32 S. E., 907.
E. St. Louis vs. E. St. Louis G. Co., 98 Ill., 415.
Weston vs. Syracuse, 17 N. Y., 110.
Cunningham vs. City of Cleveland, 98 Fed., 657.
Lamar, etc., vs. Lamar, 31 S. W., 756.
Atkins vs. Wilcox, 105 Fed., 595.
Savory vs. Stocking, 4 Cushing, 607.

The application of the principle under consideration to the case at bar is in no wise affected, whether a national bank be regarded in the light of a private or quasi public corporation, because, if it might be treated for some purposes as a corporation of the latter class, with reference to contracts entered into by it in acquiring realty, for the construction of a banking house, it would be regarded *quoad hoc*, as a strictly private corporation.

Thus, in City vs. Gardner, 97 Ind., 1, the court, in speaking of the power exercised by a municipal corporation in the acquisition of property, remarked:

> "The power to execute a contract for goods, houses, gas, water, and the like, is neither a judicial or a legislative power, but is purely a business power."

See, also, Western, etc., Society vs. Philadelphia, 31 Pa. St., 185, 189, where it was remarked:

> "The distinction between public duties and private business is wide and obvious."

See, also, Illinois Trust, etc., vs. City, 76 Fed., 271, where the Circuit Court of Appeals, for the Eighth circuit, sharply draws the distinction between the exercise of public duties on the part of a strictly public corporation and the private or proprietary functions of such corporation in the acquisition of property, holding that, with reference to the latter class of dealings, the corporation is to be treated and governed by the same rules as apply to a strictly private corporation.

A separate and additional reason why the covenants contained in the lease for the payment of rent can not be treated as imposing an obligation or creating an indebtedness upon the Bank lessee for the payment of rent during the whole of the demised term, is the principle that executory contracts on the part of corporations, whether for the payment of rent or otherwise, cease to be operative or enforcible against the latter for any and all purposes, when the corporation becomes legally dissolved by lapse of time prescribed by law for its corporate existence, though remaining enforcible as against an assignee. In other words, in legal contemplation, the covenants in the lease for the payment of rent would be binding only upon the corporation during its corporate existence, and thereafter be enforcible only against the assignee of the leasehold interest, if such lease were assigned by the corporation, or its legal representatives, before the expiration of its corporate charter.

For divers cases where this principle was announced, see

People vs. Globe, etc., Co., 91 N. Y., 174.
Lorillard vs. Clyde, 142 N. Y., 456.
Griffith vs. Blackwater, etc., Co., 46 W. Va., 56.
Fidelity, etc., Co. vs. Armstrong, 35 Fed., 567.

The foregoing authorities settle the following propositions beyond cavil:

First. That a corporation may lawfully take a lease extending beyond its corporate existence, and that such lease is valid for purposes of enjoyment and alienation by the lessee.

Second. That both parties to the lease must be assumed to have contracted with reference to the statute limiting the corporate existence of the lessee, and that the obligation to pay rent is coupled with the *implied condition* that such obligation shall become wholly inoperative for all purposes as against the *lessee*, when it becomes legally dissolved by efflux of time.

Third. Covenant to pay rent, thus falling with the legal demise of the corporation lessee, no claim for damages, either legal or equitable, could be predicated upon the fact that the corporation would be non-existent for the purpose of meeting the future installments of rent as they would mature, subsequent to the legal dissolution of the corporate life of the lessee.

Under the principles thus established, it will be seen that the covenant to pay rent was only binding upon the corporation lessee during the remainder of its corporate existence, which, in the case at bar, would amount to a little over nineteen years from the time the first installment of rent would mature. Multiplying the annual installments of rent by that number, it would be found that the aggregate amount of rent payable during the corporate life of the lessee Bank would be many thousands of dollars less than the amount of its *original* authorized capitalization.

The contention that the lessee saw fit to sub-let the unused portions of the bank building for the purpose of realizing an income is wholly without merit, the rule being thoroughly settled that it is not *ultra vires* for a corporation to rent or otherwise dispose of property or assets which it may not require for its immediate corporate purposes. This principle was well stated by the Supreme Court of Illinois, in People vs. Pullman's Palace Car Co., 175 Ill., 125, 139, where it was said:

> "The right of the appellee (Pullman Company) to construct an office building is indisputable, and so, also, is the right to select the most eligible and desirable site. It would be but a narrow and wholly unjustifiable view of this power to insist that in planning and constructing the building the corporation should leave out of consideration its probably prospective requirements, and should erect a building containing only as many rooms and offices as its present business might demand. The corporation had the right, as we think, to look to and prepare for the future. It was but true economy to do so, and, if it proceeded in good faith, no reason is perceived why it should be deemed bound by law to permit such parts of the building as are not for the present required for the accommodation of its business to remain vacant; but, on the contrary, that it might lawfully obtain such income from the rents of such rooms as might be possible until the growth or increase of its business demanded the additional rooms or offices."

For other decisions to like effect, see

Central Trust Co. vs. Columbus Co., 87 Fed., 815, 823-8.

Chicago, etc., Co. vs. Union Pacific Ry. Co., 47 Fed., 15-25.

Id., 163 U. S., 564.

Clark & Marshall on Private Corporations, volume 1, page 391, and authorities cited foot note 108.

VII.

WHERE THE VALIDITY OF A PARTICULAR ACT OR CONTRACT ON THE PART OF A CORPORATION IS CHALLENGED AS BEING IN EXCESS OF ITS POWERS, AND THERE ARE ANY CIRCUMSTANCES UNDER WHICH SUCH CONTRACT OR TRANSACTION MIGHT BE AUTHORIZED, PRIMA FACIE SUCH CONTRACT IS TO BE DEEMED VALID AND THE BURDEN OF ALLEGING AND SHOWING EVERY FACT EVINCING ABSENCE OF POWER RESTS UPON THE ONE WHO ASSAILS SUCH ACT OR CONTRACT.

This proposition is based upon the maxim *omnia acta rite esse præsumuntur*, and under its operation the bill in the case at bar utterly fails to state a case affirmatively disclosing that the lessee Bank acted in any respect in excess of its chartered powers, or in violation of the letter or spirit of the national banking laws, in the making of the lease and in the construction of the Bank building complained of.

The theory of the bill is, that such lease was void because the *aggregate* installments of rent provided for by that instrument, coupled with the covenant to expend one hundred thousand dollars ($100,000) in the construction of a substantial four-story building upon the demised premises, constituted the creation of an indebtedness or incurring of

a liability in excess of the *original* capitalization of the lessee bank, viz., three hundred thousand dollars ($300,000), and this charge constitutes the real gravamen of appellant's case.

We could safely concede the premises contended for touching the aggregate amount of indebtedness or liability incurred by the lessee in entering into the lease, but nevertheless, the case, as stated, would fall far short of establishing any violation of the banking act by reason of the transactions complained of.

The pleader informs the court that three hundred thousand dollars ($300,000) was the amount of the *original* authorized capitalization of the defendant appellee Bank, but studiously avoids negativing the fact whether such capitalization was or was not subsequently increased, as authorized by the provisions of the act of May 1, 1886, 24 Stat., 18, which expressly empowers national banks to increase their capitalization to any amount which may be approved of by the comptroller of the currency.

The limitation of indebtedness imposed by section 5202, Rev. Stat. U. S., is not based upon the amount of the bank's *original* capitalization, but, on the contrary, the statute in express terms applies to the capital stock of the bank as it may exist at the time of the incurring of any particular indebtedness.

Hence, for aught that appears in the bill, the capital stock of the appellee Bank may have been duly increased and actually paid in to an amount sufficient to equal every dollar of conceivable indebtedness or liability assumed or incurred under the provisions of the lease, even though it were conceded that the aggregate amount of rentals for the full demised period could be properly treated as the incurring of an indebtedness or liability within the purview of said section 5202; and for the purposes of this suit it is proper

to indulge in the presumption that the capital of the Bank was so increased, prior to the making of the lease, if such presumption be necessary in order to uphold the transactions complained of.

The principle here contended for has been repeatedly recognized by this court.

Thus, in Merchants' Bank vs. State Bank, 10 Wall., 604, 644, the court, *inter alia*, stated that it was an axiom in the law of corporations that

> "if the contract can be valid under *any circumstances*, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."

This case was subsequently referred to with approval in Louisville, etc., Ry. Co. vs. Louisville, etc., Co., 174 U. S., 552.

In Railway Co. vs. McCarthy, 96 U. S., 258, 267, Mr. Justice Swayne, speaking for the court, said:

> "When a contract is not on its face *necessarily* beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers."

And in Express Co. vs. Railroad Co., 99 U. S., 191, 199, the same judge remarked:

> "The contract of a corporation is presumed to be *infra vires*, until the contrary is made to appear."

And in Central Trans. Co. vs. Pullman's Co., 139 U. S., 24, 60, Mr. Justice Gray, as the organ of the court, remarked:

> "When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites *might in fact have been complied with.*"

A statute of Tennessee provided that in case of increase of capital stock, the corporation so increasing should pay a certain privilege tax, and prohibited in the most explicit terms the exercise of any corporate powers until such tax should be first paid.

Notwithstanding such statute, the Circuit Court of Appeals for the Sixth district, in Peck vs. Elliott, 79 Fed., 10, 18, held (in a suit to enforce subscription to increased capital), that *it would be presumed* such tax had been paid until the contrary was affirmed and shown. In other words, it would be assumed that the corporation had complied with the law.

In Maricopa, etc., Co. vs. Arizona, 156 U. S., 347; 15 S. C. Rep., 391, 393, the court applied the doctrine under consideration to a case where Congress had granted a right of way for the construction of the Maricopa & Phœnix line of railway through the Pima-Maricopa Indian reservation in the territory of Arizona, subject, however, to the express condition, that before any of the lands, upon such reservation, could be taken for railway purposes, "the consent of the Indians thereto shall be obtained in a manner satisfactory to the president of the United States."

While it appeared from the record that the railway line had been built into and through the reservation, it was not

affirmatively alleged or proved that the Indians had given their consent thereto, as required by the act, and it was urged that no lawful right to construct the railroad therein appeared. The court disposed of the point, however, by saying:

> "As the company has taken the rights granted by the statute, the legal presumption of duty performed ('omnia rite,' etc.) requires us to assume that the consent was given in accordance with law."

We, therefore, feel justified in announcing the broad proposition, that the bill fails to state sufficient facts which clearly and affirmatively disclose that the transactions assailed were *ultra vires* in any sense of that phrase known to the law. The bill, moreover, fails to aver that appellee, Schleier, when he executed the lease, had any notice or knowledge that the lessee Bank contemplated any violation whatsoever of the provisions, or any of them, of the national banking act, either as to the size or cost of the banking building to be erected upon the demised premises, or the use to which such building might be subsequently devoted, and it is elementary law that, before a contract can be assailed by a corporation, or any one representing it, on the theory of *ultra vires*, notice must be brought home to the other contracting party at the time the transaction is entered into, that the corporation was then engaged in the doing of an act unauthorized by its charter.

In conclusion, upon this branch of the case, we may remark that the claim of appellant, that a national bank has no power to enter into covenants in a lease for the construction of a building, even though the same be designed for use in carrying on its banking business, is so puerile that we do not deem it worthy of serious refutation. The express power to make contracts conferred by the national banking

act upon national banks must certainly be deemed broad *enough to authorize it to contract for the construction of a* bank building.

VIII.

CONCEDING, ARGUENDO, THAT THE ENTERING INTO OF THE LEASE BY THE APPELLEE BANK WAS AN ACT IN EXCESS OF ITS CHARTERED POWERS, OR FOR A PURPOSE NOT AUTHORIZED BY LAW, NEVERTHELESS, SUCH MISUSE OR ABUSE OF CORPORATE POWERS IS NOT ULTRA VIRES IN THE SENSE THAT THE BANK, ITS RECEIVER OR ITS CREDITORS, CAN BE HEARD TO COMPLAIN.

The national banking act, after vesting the banking associations with divers and sundry express powers, among them the power to make contracts, to purchase, hold and convey real estate, for certain purposes and to a limited extent, then imposed certain limitations with reference to the manner in which the banking privileges and franchises may be exercised. Nowhere in the act, however, is it declared that if a banking corporation shall purchase or acquire a greater amount of real estate than it may require for legitimate banking purposes, or in part for an unauthorized purpose, that its act or contract in that behalf shall be void or subject to attack by any private person whomsoever. Indeed, the act, as a whole, seems to be drafted with a view of excluding the idea that contracts entered into by a bank, merely in *excess* of its chartered powers, or where an authorized contract is entered into for some unauthorized purpose, that in either case the validity of the contract can ever be questioned for the purpose of defeating a recovery thereon or rescinding the same. But one penalty is provided for where the provisions of the act, or any of them, may be violated by the bank, and that is contained in section 5239. The penalty there prescribed is: First—The forfeiture of

the bank's franchises and the dissolution of the association, in a suit brought directly in the name of the comptroller of the currency for that purpose. Second—That, where a shareholder or other person may sustain damage arising from such violation or violations, an action may be maintained by the party or parties injured against the offending directors *personally*, who consented to or participated in such violation or violations. This is the alpha and omega of penalty or liability prescribed by the statute in case of mere misuse or abuse of chartered powers by a national bank.

Under a variety of circumstances, where national banks were guilty of entering into contracts in violation of one or more of the sections or provisions of the national banking act, this court has uniformly adhered to the doctrine that the only penalty which could be imposed was a forfeiture of charter, and that no one but the government, in a direct suit for such purpose, could be heard to question the validity of the acts complained of. We need but refer to the following leading cases on the subject to establish the correctness of the proposition just stated:

Bank vs. Matthews, 98 U. S., 621.
Reynolds vs. Bank, 112 U. S., 405.
Mining Co. vs. Bank, 96 U. S., 640.
Bank vs. Stewart, 107 U. S., 676.
Bank vs. Whitney, 103 U. S., 99.
Thompson vs. Bank, 146 U. S., 240.
Fritts vs. Palmer, 132 U. S., 282.
Jones vs. Habersham, 107 U. S., 174, 188.
Cowell vs. Springs Co., 100 U. S., 55, 60.
Hitchcock vs. Galveston, 96 U. S., 341, 351.
McDonald vs. Williams, 174 U. S., 397.

In the early case of Harris vs. Runnels, 12 How. (U. S.), 79, 84, the principle underlying the foregoing decisions was expressed in these words:

> "It is true that a statute containing a prohibition and a penalty makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition, but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it."

And the doctrine thus stated has been consistently followed by this court.

The logic of the principle established by these cases unerringly leads to this conclusion: That even where it conceded that the appellee Bank exceeded its chartered power, with reference to the amount of indebtedness or liability created or assumed by the terms of the lease, and further exceeded its chartered power with reference to the cost and size of the bank building erected upon the demised premises, nevertheless, as the Bank possessed the general power to purchase and acquire real estate, either in fee, or by leasehold interest, and was further vested with the general power to contract indebtedness for such purpose, no one but the government could be heard to complain of such misuse or abuse of its general powers, and then only for purposes of forfeiture of franchises.

The lease, including all its obligations, notwithstanding such misuse or abuse of corporate power, would remain valid and enforcible as between the parties thereto and their privies, and hence the doctrine of *ultra vires*, in its true acceptation, has no legitimate application in the pending controversy.

IX.

THE APPELLEE NATIONAL BANK AND THE APPELLANT RECEIVER, AS ITS STATUTORY ASSIGNEE, ARE ESTOPPED TO URGE THE INVALIDITY OF THE LEASE IN CONTROVERSY.

While it may be said to be the settled doctrine of this court that a corporation, or its representative, will not be estopped to challenge the validity, under some circumstances, of a contract entered into by it, where such contract was *ultra vires* in the *extreme* sense of the term, i. e., absolutely void at the time of its execution because of a total want of power to enter into a transaction of the character involved, nevertheless, it is also settled in this tribunal that where the contract was merely voidable in its inception, and not absolutely void, the principle of estoppel *is* applicable.

In Sioux City, etc., vs. Trust Co., 173 U. S., 99; 19 S. C. Rep., 341-346, Mr. Justice White, as the organ of the court, said:

> "The decisions of this court which are relied upon considered the application of the doctrine of estoppel to corporate acts absolutely void, and not its application to contracts which were merely voidable."

The utmost line of argument, savoring even of plausibility, which can be urged against the validity of the transaction assailed, is to the effect that the appellee Bank merely abused or exceeded its express corporate powers.

As already pointed out, express statutory authority existed in its behalf to acquire real property necessary to enable it to carry on its banking business.

Power to contract indebtedness, subject to certain limitations, was also directly conferred. The general power

to enter into contracts is likewise in terms granted by the national banking act. In taking the lease, and in contracting whatever indebtedness or liability was assumed thereby, the Bank was acting strictly within the scope of its express chartered powers.

Arguendo merely, it may be conceded that such authority was abused or exceeded in the given instance; nevertheless, under the authorities already cited, the proposition is settled beyond cavil that, as the statute does not in terms declare the particular contract to be void because of such abuse or excess, no one but the government can be heard to complain, and then only for the purpose of charter forfeiture.

Hence the Bank and its representative, the appellant receiver, are now estopped from questioning the validity of the lease or the surrender thereof. The presence of the essential elements of estoppel are obvious. The Bank voluntarily entered into the contract in question; received possession of the demised premises from the lessor; held and enjoyed the use and possession thereof for years; required the lessor to remove buildings situate thereon at the time of the execution of the lease, and in every conceivable manner recognized and treated the lease and all of its terms as lawful, binding obligations for nearly ten years before the same was finally, by mutual agreement, canceled and surrendered.

Again, the cancelation and surrender of the lease were voluntarily solicited by the Bank solely for the purpose of relieving itself from present indebtedness to the lessor, and to absolve itself from future, accruing, onerous obligations resulting manifestly from unanticipated changed conditions seriously affecting the intrinsic value of the demised premises as it existed at the time the surrender was effected.

All these acts being had and done in the utmost good faith on the part of both lessor and lessee, so far as aught that appears in the bill by due averment to the contrary,

the salutary principles underlying the doctrine of estoppel now preclude the appellant from maintaining this litigation upon the sole, dry, naked, legal proposition that the lease was originally a voidable instrument, because of the mere alleged abuse or excess of the Bank's charter powers in becoming a party thereto.

X.

EVEN IF A CONTRACT BETWEEN A CORPORATION AND ANOTHER MAY BE SAID TO BE ULTRA VIRES IN THE EXTREME SENSE, NEVERTHELESS, IF SUCH CONTRACT BE FULLY EXECUTED, IN GOOD FAITH, BY THE OTHER PARTY, THE CORPORATION, OR ITS PRIVIES, CAN NOT MAINTAIN AN ACTION TO RECOVER MONEYS EXPENDED BY THE CORPORATION, PURSUANT TO SUCH CONTRACT.

In considering the doctrine of ultra vires, as expounded by this court, the following principles may be fairly said to be firmly established:

First. Where a contract *necessarily and affirmatively* appears to be void on its face, as an ultra vires act, i. e., a transaction wholly without the scope of the charter powers of the corporation party thereto, then in such case, while the contract remains executory, no action whatsoever can be maintained upon it by either party, and the doctrine of estoppel is not applicable.

Second. Where, under such circumstances, the corporation pays money, or delivers property to the other contracting party, and the latter, thereafter, either *repudiates* the contract, or *refuses* to perform his obligations imposed thereby, then, upon such *repudiation* or *refusal*, the corporation may, under certain circumstances, recover, upon a *quantum valebant*, the value of the benefits received by the other contracting party from it.

Third. Where such *ultra vires* contract is entered into and the other contracting party has, in good faith, fully executed the agreement upon his part, and has never repudiated or attempted to repudiate the contract in any form, the corporation, or its privies, in such case, can not maintain an action, either legal or equitable, to recover the value of moneys or property parted with by the corporation, pursuant to the terms of such contract.

The case at bar falls under the last stated head.

In Penn. Co. vs. St. Louis, etc., Co., 118 U. S., 290, 316-17-18, the court referred to the doctrine under consideration, where, in commenting upon a void contract which had been fully executed by one of the parties thereto, it remarked:

> "The courts will not disturb the possession of such property or compel restitution of money received under such a contract."

In St. Louis, etc., Co. vs. Terre Haute Co., 145 U. S., 393, a bill in equity had been filed by the St. Louis Company, to cancel and set aside a lease or conveyance, which had been made to the Terre Haute Co., of its railroad and franchises for the term of nine hundred and ninety-nine (999) years.

The theory of the bill was that the lease was void, as an *ultra vires* transaction; that the defendant company had received, in tolls and income from the operation of the road, under the lease, sums in excess of twenty-one millions of dollars; that demand had been made for a surrender of the demised premises, and the defendant had refused to comply with such demand.

The bill was dismissed for want of equity, and on appeal this court affirmed the decree. In the course of its opinion, this court stated in the most positive and unequivocal terms,

that the lease was absolutely void as an *ultra vires* conveyance, and, on page 406, remarked:

> "It may therefore be assumed, as contended by the plaintiff, that the contract in question was ultra vires of the defendant, and therefore did not bind either party, and neither party could have maintained a suit upon it, at law, or in equity, against the other."

The court then proceeds to discuss the question as to the effect of such a contract when executed, saying in this connection:

> "When the parties are in *pari delicto* and the contract has been fully executed on the part of the plaintiff by the conveyance of property, or by the payment of money, *and has not been repudiated by the defendant*, it is now equally well settled that neither a court of law *nor a court of equity* will assist the plaintiff to recover back the property conveyed *or money paid under the contract.* * * * The invalidity of the contract in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant, and the defendant has held the property and paid the stipulated consideration from time to time for seventeen years, *and has taken no steps to rescind or repudiate the contract.* Upon this state of facts, for the reasons above stated, plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to

set it aside. * * * This case is not like those in which the defendant, *having abandoned or refused* to perform the unlawful contract, has been held liable to the plaintiff upon an implied contract, for the value of what it had received from him, and had no right to retain. But the case is one in which in the words of Mr. Justice Miller (a case often cited in this opinion) the court will not disturb the possession of the *property that has passed under the contract*, but will refuse to interfere as the matter stands." (Citing several cases.)

Pullman's Palace Car Co. vs. Cen. Transportation Co., 171 U. S., 138.

Facts: The Central Transportation Co., in 1870, demised to the Pullman Co. all its sleeping cars, patent rights pertaining thereto, franchises, etc., for a period of 99 years, for a stipulated annual rental, the lease containing a provision that the Central Company would not engage in the business of manufacturing, using or hiring sleeping cars while the contract remained in force.

After this contract had been in force for some years, the Pullman Company claimed the right under a provision of the contract to terminate the same, or pay a smaller rent than agreed upon.

This contention of the Pullman Company being denied, suits were brought by the Central Company to recover installment of rent in arrears. In one of such suits the Pullman Company pleaded the illegality of the lease as *ultra vires* the charter of the Central Company, and such plea was upheld in the lower court and sustained by this court, in the case of Central, etc., Co., vs. Pullman's, etc., Co., 139 U. S., 24.

Other suits for the recovery of rent having been instituted by the Central Company, before the question of *ultra vires* had been so adjudged, the Pullman Company filed its bill to restrain the bringing of any more suits for rent.

In such bill the Pullman Company elected to terminate the lease under an alleged provision of that instrument to that effect, and avowed its willingness to pay whatever should be found by the court to be equitable and just, the theory of the latter suit brought by the Pullman Company being based upon the idea that the contract was a nullity.

After various proceedings were had in the lower court, a decree was rendered in favor of the Central Company for a sum in excess of four millions of dollars, on the theory that the allowance of such amount was equitable for the use of the property, after giving credit for the rents which had been in fact paid.

This court, in a lengthy opinion, again announced the doctrine that any recovery which could be permitted in favor of either party for moneys or property which had been received from the other under an *ultra vires* contract, must be upon the theory of a disaffirmance of the contract, and the restoring to the complaining party whatever might be just or equitable under all the circumstances of the case.

The court, however, dissented from the views repeatedly expressed by the lower court, as to the principle upon which compensation should be awarded the lessor company for the use of the property and franchises covered thereby, while the lessee remained in possession and in enjoyment thereof, saying, on page 159:

> "Nor can we accede to the view that the Pullman Company was liable for the earnings of the property which it realized by means of putting such property to the very use which the lease provided.

It had the right, while both parties *acquiesced,* to so use the property. There *is no question of trustee in the case.* The property was placed in its hands by the lessor and in accordance with the terms of the agreement. It was not then impressed with *any trust,* according to any definition of that term known to us. Although the title did not pass, and was not intended to pass, the lessee did nothing with the property other than was justified by the lease. His liability is based only upon an implied promise to return or make compensation therefor. This implication of a promise would not arise until one or the other party chose to terminate the lease, for the law implies such promise in order only that justice, so far as possible, may be done. *So long as neither party takes any objection to the agreement, and both carry it out, there is no room for any differences,* and no promise to return the property or make compensation is necessary, and none is, therefore, implied. The use of the property was lawful as between the parties so long as the lease was not repudiated by either, and *the rent compensates for the use. After the repudiation the promise is then implied,* and it is fulfilled by the payment of the value of the property at the time the promise is implied, and interest thereon from that time."

It will be observed from this language that the court totally repudiates the idea that the transferring of the property and the subsequent use, improvement and enjoyment thereof under an *ultra vires* lease creates any character of trust relation; that so long as both parties to such agreement carry it out, and neither repudiates any of its terms or provisions, the contract, as between them, is a lawful

one, and no duty, no implication of a promise, no character of a legal or equitable right after the agreement has been fully executed by both sides can or ever will arise to recover money or property which has changed hands as the result of such executed contract.

In short, the *rationale* of the principle announced by this court is to this effect—that so long as one party to an *ultra vires* contract in good faith fulfills and perform all of the obligations which he assumed under such agreement, the other party is not at liberty to repudiate the same, and then claim the right to recover any money or property which he paid or conveyed to the other, upon the theory that any trust relation was created with reference to such money or property growing out of the performance of such contract.

For another case announcing a like principle, see National Bank vs. Stewart, 107 U. S., 676.

For other authorities announcing the like principle, see

Taylor vs. Railroad Company, 4 Woods, C. C., 575.

Long vs. R. R. Co., 91 Ala., 519.

2 Morawetz on Corp. (2d Ed.), sections 721 and 723.

The text of the last cited section reads:

"If, however, the benefit received (under *ultra vires* agreement) is not of such a character as to give rise to a technical debt which could be recovered at *common law*, under and *in debitatus count*, and there is no equitable relation between the parties giving rise to an equitable obligation, the party receiving the benefit can not be compelled to pay for it *unless he agreed to do so.*"

We have already shown by repeated decisions of this court that no equitable relations of any character arise merely by virtue of money or property changing hands under an *ultra vires* agreement, save and except in cases where the party receiving such money or property commits a breach of the provisions of such agreement and refuses to carry out the same or be bound thereby.

See, also, Marvin vs. Anderson, 111 Wis., 387, where the subject is thus pithily stated:

> "The whole trend of modern decisions is against the impeachment of executed corporate transactions, except by punishment of the corporation at the suit of the state."

The application of the principles thus announced to the case at bar are obvious. Lessor Schleier fully executed the contract upon his part by the execution of the lease and the delivery of the demised premises thereunder. He never attempted to repudiate the transaction in any form, and in all respects treated the lease as a valid, binding contract. Hence, no equity arises in favor of the Bank or its creditors, for moneys expended by it in the improvement of the demised premises; and especially is this true in the present instance, when such moneys were not paid out or received by the lessor, but were expended by the Bank for its own uses and with the sole purpose and intent of benefiting itself.

If the lease had not been terminated by mutual agreement and the lessee Bank had continued to promptly pay the rental stipulated in the lease, it goes without saying that the lessor would have no standing in a court of equity, for a cancellation of the lease, or an accounting for profits against the Bank, on the theory that the transaction was *ultra vires*.

If the lessor could not succeed in a court of equity, under such circumstances, upon what permissible theory can the Bank, or its representatives, maintain an equitable suit of any character, when the lessor had fully executed the agreement upon his part and no attempt had been made by him to repudiate the title or interest assumed to be conveyed by the lease?

We will conclude the discussion upon this branch of the case by calling attention to the latest adjudication upon the subject of the status of a creditor of a corporation, touching alleged *ultra vires* transactions of the latter, in the absence of fraud, whether the corporation is solvent or insolvent when the alleged *ultra vires* contract is entered into.

We refer to Force vs. Age-Herald Co. et al., 33 So., 866-68, decided by the Supreme Court of Alabama. On the latter page the court remarked:

> "A creditor can not attack a corporate transaction on the ground that it is *ultra vires merely*, where no fraud is charged. This right is confined to the corporation itself, or where it refuses to account to the stockholder, or, in a proper case, to the state.
>
> "The only ground on which a creditor may assail a corporate transaction in equity, is that its intent or effect is to fraudulently divert or destroy the corporate assets, which are subject to the payment of the corporate debts * * * and this whether the corporation is solvent or insolvent." (Citing O'Bear Jewelry Co. vs. Volver, 106 Ala., 205; and O'Connor Mining Co. vs. Coosa, etc., Co., 95 Ala., 618, is cited to the same effect.)

This court has virtually announced the same principle as thus declared by the Supreme Court of Alabama. In Hollins vs. Briarfield Coal Co., 150 U. S., 371, 385, the court said:

> "The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called upon to account for fraud or sometimes mere mismanagement in respect thereto, but as between itself and its creditors, the corporation is simply a debtor and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor."

XI.

THE MUTUAL RELEASES AND ADJUSTMENTS ENTERED INTO BETWEEN THE LESSOR AND THE LESSEE BANK, WHEREBY ALL CLAIMS AND INTERESTS GROWING OUT OF THE TRANSACTION HERE ASSAILED WERE RESPECTIVELY COMPROMISED AND SETTLED, CONSTITUTED A LAWFUL, BINDING CONTRACT, EVEN THOUGH THE CONSIDERATION THEREOF WAS THE RELEASE OF MUTUAL CLAIMS GROWING OUT OF AND UNDER AN ULTRA VIRES AGREEMENT.

The correctness of this proposition has been directly affirmed by this court in Northern Liberty Market Co. vs. Kelly, 113 U. S., 199, 202, where, inter alia, it was said:

> "If the plaintiff had exceeded its corporate powers in making the original contract, yet it had authority to compromise and settle all claims by or against it under that contract. The compromise of the disputed claim on the original notes was a legal and sufficient consideration for the new note."

For other authorities to the same effect see:

Llano, etc., Co. vs. Pacific, etc., Co., 66 Fed., 526.
Union Bank vs. Geary, 5 Peters, 99.
Sigsworth vs. Coulter, 18 Ill., 204.
Hennessy vs. Bacon, 137 U. S., 78, 85.
White vs. Hoyt, 73 N. Y., 505.
French vs. Shoemaker, 81 U. S., 314.

Under the rule established by these decisions and other authorities which might be cited, settlement and compromise of the then existing claims and demands of the lessor Schleier for the rents and taxes in arrears and the liability of the Bank for future rents, as the same would mature, afforded a valid consideration for the surrender of the unexpired portion of the leasehold term by the Bank, including the Bank building standing upon the demised premises, even though the lease, when executed, was, per se, an *ultra vires* agreement for the reason that the invalidity of the lease could only be authoritatively determined (if at all) after protracted and expensive litigation, and for the further reason that the law favors compromises and settlements rather than litigation.

XII.

THE RELIEF SOUGHT IN THIS SUIT IS INEQUITABLE, AND NO PRECEDENT EXISTS FOR A RECOVERY UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS.

The books will be searched in vain for a precedent recognizing a right to recover by appellant under the circumstances here appearing of record. In any and every instance where a corporation has been allowed to recover money paid

by it under an *ultra vires* contract, it will be found that each and every of the following underlying conditions existed:

a. That the corporation was absolutely prohibited by law from acquiring title in the given case to the given property, in any manner or to any amount; in short, when there was a total want of power to enter into the transaction to any extent or at all.

b. Where, in legal contemplation, the grantor did not and could not part with his title to the thing attempted to be conveyed, because of the absolute disqualification or want of power on the part of the corporation to take title to any extent or at all.

c. Where the corporation acted with reasonable promptness in suing to recover back moneys paid under such attempted and ineffectual conveyance, and where the right to recover on the part of the corporation would leave the grantor in no worse position than he was in when the corporation parted with its money to him.

Not one of these conditions exists in the case at bar.

Here the attempt is made, through the medium of a court of equity, *not* to recover moneys paid by the Bank to the lessor, but to virtually forfeit the title of the lessor to his own property, in order to create a fund for the payment of the debts of the corporation, solely upon the theory that the Bank voluntarily expended moneys in the construction of a building upon the property of the lessor, when, as it is said, the statute did not vest the corporation with the power to use its moneys in such manner.

Reduced to its last analysis, this is a suit to create and enforce a forfeiture; to judicially impose pains, penalties and punishment upon lessor Schleier, because of his supposed fault in entering into an alleged *ultra vires* lease with the Bank. A forfeiture is attempted to be created and enforced because the court is asked to decree a lien upon and authorize the sale of specific real estate, the fee simple title to which has always been vested in the lessor. In other words, he is to be deprived of specific property, which he never received from the corporation, and a punishment is inflicted to the extent of the deprivation of his title, merely because he consented to become a party to the contract voluntarily entered into by the Bank, and under which the latter thereafter voluntarily expended three times the amount of money in improving the property which was exacted by the terms of the lease. It is now impossible to restore the statu quo.

Grymes vs. Sanders, 93 U. S., 55.

The bill of complaint does not inform the court what the market value of the demised premises was the day the lease was executed, as compared with such market value the day the lease was surrendered, with the bank building then standing thereon. For aught the bill discloses, the value of the naked land covered by the lease at the date of its execution exceeded the value of the same tract, plus the bank building, the day the lease was surrendered. If this be true, then, as a matter of fact, the lessor was not benefited by the expenditure of the money of the Bank in the erection of the building.

It is entirely consistent, therefore, with the averments of the bill, that if the relief asked for were accorded, the lessor would simply lose his title to the whole of the demised prem-

ises, without ever having received one farthing's benefit from the Bank's voluntary expenditures. This is a novel claim, to seriously advance in a court of equity. It is unique and unparalleled.

It is but a trite statement of horn-book law, that courts of equity never enforce penalties or forfeitures or anything savoring thereof, and especially where the attempt in that direction is based upon the abstract proposition of *ultra vires*, a defense or claim that the courts have frequently denounced as odious in its very nature.

Aside from these general principles, there are special reasons in addition why the relief demanded in this suit is beyond the province of a court of equity to grant. These special reasons may be thus summarized:

First: It is settled law that a landlord is never under obligation to pay a tenant for buildings erected by the latter on demised premises, in the absence of a specific, *express* agreement to that effect. No tribunal has enforced this rule more stringently than this court.

Kutter vs. Smith, 2 Wall., 491.
Kinkead vs. U. S., 150 U. S., 483.

Second: Equity never entertains jurisdiction at the suit of a lessee or other party *out of possession*, to recover the value of improvements erected upon the demised premises by such lessee, wholly regardless of the circumstances under which such improvements were made. Equitable relief in such cases is exclusively confined to instances where the owner of land is *complainant* in a court of equity, seeking some relief against the lessee or other person who erected the improvements, and then only agreeable to the maxim, that "He who seeks equity must do equity."

For authorities announcing and elaborating this principle, see:

Dawson vs. Grow, 29 W. Va., 335, et seq.

Williams vs. Vanderbilt, 145 Ill., 251.

Second Jones on Liens, section 1136.

Putnam vs. Ritchie, 6 Paige, 390, 405.

3 Pom., Eq., section 1241; also note 2, same section.

Young vs. Pate, 3 J. J. Marshall (Ky.), 100.

For an interesting case, where this court in effect accepted the principle here contended for, see Litchfield vs. Ballou, 114 U. S., 190. The facts therein were as follows: The defendant city had obtained a large amount of claimant's money, upon an issue of *ultra vires* bonds, and had invested such moneys, with other funds, in the construction of a water works plant, and the attempt was made to establish a lien and impress a trust upon such works in favor of the plaintiff, for the purpose of thus enabling the plaintiff to recover the moneys received by the city under the *ultra vires* contract, and which contract had been expressly repudiated by the city. This court directed the dismissal of the bill, distinctly holding that the specific property, in part created by the funds of the plaintiff, could not be impressed with a trust in his favor, and that the relief sought was without the province of a court of equity to grant.

See, also:

Aiken vs. Suttle, 4 B. J. Lea (Tenn.), 103.

It will be found, upon examination of these authorities and other cases referred to therein, that it is an inflexible rule in a court of equity that a party *complainant* can never

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obtain affirmative relief by way of reimbursement for moneys expended in the improvement of the lands of the defendant, lessor, vendor, mortgagor, or otherwise. The claim for reimbursement, in any and all of such cases, regardless of its abstract justice or equity, can only be employed in a court of equity as a shield, by way of defense, and not as a weapon of attack.

In a case like the one at bar, where the lessee Bank had full notice and knowledge of every material fact at the time the lease was entered into and improvements erected and paid for, and fully and thoroughly understood its legal rights and status in connection with the erection of such improvements, and where the landlord was not guilty of any *fraudulent* conduct in fact, we assert, with absolute confidence in the accuracy of our statement, that not a case can be found in the books to countenance the right of any one, whether occupying the position of creditor or otherwise, to compel the lessor to pay for the cost or value of such improvements.

The case was rightfully disposed of, therefore, in all of the lower courts, upon the ground, if no other, that a court of equity will never grant the particular relief specifically prayed for in the present instance.

XIII.

THE SURRENDER OF THE LEASE AND BUILDING DID NOT AMOUNT TO AN ILLEGAL PREFERENCE TO APPELLEE SCHLEIER, AS A CREDITOR, IN CONTRAVENTION OF THE NATIONAL BANKING ACT.

The question whether the surrender of the lease and building does, or does not, constitute an illegal preference by the appellee Bank, as an insolvent institution, is not properly

presented by the bill of complaint, for the reason that the prayer for relief does not ask for a restoration of the leasehold interest, charged with its obligations and liabilities, and a redelivery of the demised property and the building to the appellant receiver. On the contrary, the specific prayer for relief is that the original lease itself shall be declared cancelled and held for naught, as a void and *ultra vires* instrument.

The prayer is not based upon the theory that the sole creditor represented by the receiver was, in any respect, injured by the mutual releases and settlement between the appellees, but that the alleged and sole injury sustained by such creditor was the fact that the Bank originally parted with three hundred and five thousand dollars ($305,000) of its assets in the improvement of the property of the lessor, such expenditure being made, as contended, without authority of law.

It is not charged or pretended that the leasehold interest, including the bank building, subject to the obligation to pay rent, taxes and other fixed charges, possessed any marketable or assignable value whatsoever at the time of the surrender of the lease. In other words, it is not attempted to be charged that the Bank parted with anything of value to its creditors, by the final settlement entered into with the lessor in October, 1897.

The logic of the appellant's contention must necessarily be, that the appellant receiver could successfully maintain the present action, and obtain a decree for the lien and accounting prayed for, *even though no formal surrender of the lease had ever been made.*

It affirmatively appears, from the statements contained in the bill, that the officers and stockholders of the Bank regarded the leasehold interest, at the time of its surrender, as a burden, rather than a benefit; that the income from the

building in its then condition, was not sufficient to pay the fixed charges created by the lease.

The stockholders and officers of the Bank, moreover, were the moving parties in the effort to induce the lessor to accept the surrender of the demised premises and the building thereon, in consideration of a release of the Bank for rent and other charges in arrears, and for all future liability upon subsequent accruing rent. There was no concealment of the purpose and desire of the Bank in that behalf. Repeated public notices were given to the stockholders of the Bank, as well as the world at large, that the officers of the Bank were desirous of relieving it from the further burden of paying the charges required by the lease, and that, as a sound business proposition, it was highly desirable in the *then* condition of the property, that the lessor might be induced to accept a surrender and cancellation of the lease, in exchange for the release of the Bank upon past, as well as future, obligations thereunder.

The sole existing creditor of the Bank was, therefore, in nowise injured or prejudiced by a surrender and cancellation of the lease, and hence the transaction did not come within either the letter or the spirit of the provisions of the national banking act, relative to illegal preferences by an insolvent banking institution.

Moreover, the lessor was a secured creditor, in legal contemplation in reference to the covenants of the lease for the payment of the rent, because no other creditor of the Bank could acquire the Bank's interest in the lease or building without complying with the obligation to pay the rentals, which, by operation of law, became a lien or first charge upon the property.

Aside from this, however, the allegations of the bill of complaint fail to show any violation by the Bank with reference to a supposed illegal preference in favor of the lessor,

were it conceded that he occupied the position, simply, of a general, unsecured creditor.

The bill does not charge that the surrender of the lease was made with a view of preventing the application of the Bank's assets as prescribed by law, nor does it charge that it was made "with a view to the preference" of one creditor to another. Averments to that effect are essential in order to disclose an illegal preference within the contemplation of the statute.

Sec. 5242, Rev. Stat. U. S.
Scott vs. Armstrong, 146 U. S., 499.
McDonald vs. Bank, 147 U. S., 397.

The bill, moreover, fails to charge that the officers of the Bank knew of its insolvency at the time of the surrender of the lease. This fact should also be averred.

See
McDonald vs. Bank, supra.

Again, there are no averments of fact contained in the bill which make out a *prima facie* case of the insolvency of the Bank at any time prior to the 20th day of December, A. D. 1899, when the comptroller of the currency placed the Bank and its assets in the hands of a receiver on the ground of insolvency.

The bill merely charges, as a legal conclusion, and then only upon information and belief, that from the *21st day of August, A. D. 1893*, down to the *20th day of December, A. D. 1899*, or practically six years and a half, the Bank continued to be insolvent; but the pleading at the same time affirmatively discloses that the Bank was a going, active concern, doing business as a national banking institution during the

whole of the six years and a half that the pleader asserts he is informed and believes the institution was insolvent.

Will this court presume, in the face of these admitted facts, that the comptroller of the currency was so careless or indifferent to the discharge of his official duties, that he would permit an insolvent bank to continue to do business, receive deposits and carry on a general banking business for over six years, when during every day of that time the concern was insolvent? The supposition is preposterous.

It has been repeatedly held that mere general allegation of insolvency, without averring the facts and circumstances, showing that such condition exists, is tantamount to the statement of a mere legal conclusion, and in such case the demurrer does not admit the supposed insolvency.

See

Atlantic Trust Co. vs. Consolidated, etc., Co., 49 N. J. Eq., 402.

New Foundland, etc., Co. vs. Schack, 40 N. J. Eq., 222.

If the naked, general charge of insolvency is eliminated from the bill, there are no facts appearing therein which would even suggest that the Bank was, in any manner, financially embarrassed, prior to or at the time of the surrender of the lease and the execution of the mutual releases of the parties thereto. In short, a comparison of the averments of the bill with the provisions of section 5242, Rev. Stat., will disclose that there is hardly an effort made to state a case which would bring the surrender of the lease within either the letter or spirit of that section.

For a comprehensive summary of the vital defects in the appellant's bill, in failing to state any of the essential facts requisite to the setting forth of a case of illegal preference,

in contravention of the national banking act, see the concluding portion of the opinion of the Court of Appeals in this case, set out on page 111 of the transcript of record herein.

The *resume* there contained clearly and concisely points out the radical insufficiency of the bill in that behalf.

XIV.

THE BILL OF COMPLAINT SHOWS THAT THE PEOPLES SAVINGS BANK (THE ONLY CREDITOR OF THE NATIONAL BANK), WHICH THE APPELLANT REPRESENTS IN THIS ACTION, AND THE COMPTROLLER, HAVE BEEN GUILTY OF LACHES.

This is true because the original bill, filed December 22, 1900, shows that the National Bank was, between July 19th and August 21, 1893, in the hands of the comptroller, through his receiver, J. B. Lazear, during which time the comptroller did not attack the validity of the lease. It also shows that the stockholders and creditors of the National Bank allowed the said Lazear, receiver, to be discharged, and the property of the Bank (which necessarily included the lease and building) to be returned to the National Bank. The allegations of the bill further show that in 1897, *public notice was given for several months of the intention of the National Bank to turn over the building to Mr. Schleier*, and fails to allege that any protest was made by any stockholder or creditor of the National Bank. The complaint also shows that the *lease* between Mr. Schleier and the National Bank was *duly recorded.* The court will also take judicial notice of the law which requires national banks, not less than five times each year, to report to the comptroller, and to publish, in the place where they do business, statements showing their resources and liabilities.

That the question of laches can be raised in the federal court by demurrer, is clearly settled by several decisions of this court.

Landsdale vs. Smith, 106 U. S., 391, 393.
Speidel vs. Henrici, 120 U. S., 377, 387.
National Bank vs. Carpenter, 101 U. S., 567, 568.
Bryan vs. Kales, 134 U. S., 126, 135.

Therefore, even if the Savings Bank, which the appellant represents, was, at the time the lease was made and the building constructed, and at the time the same were surrendered, a creditor of the National Bank, it stands guilty, by the allegations of the bill, with laches, both by reason of unexplained delay in commencing this suit and its failure in any manner to object to the validity of the lease for more than ten years, it being chargeable with notice of all the matters complained of during such period prior to the institution of this suit. If, on the other hand, the Savings Bank was not a creditor at the time the lease was made and the building was constructed, then, as already pointed out, it, as such, can not complain of and ask relief against either of such transactions.

XV.

THE CIRCUIT COURT DID NOT ERR IN REFUSING TO ALLOW THE PLAINTIFF TO FILE HIS AMENDED BILL TENDERED SUBSEQUENT TO THE RENDITION AND ENTRY OF FINAL DECREE.

The complainant amended his original bill after the filing of the demurrer thereto and before argument thereon. (Record, page 35, et seq.) The second amended bill, the refusal of leave to file which is assigned for error, was not tendered until more than a month after the dismissal of the

original bill, as amended, and not until sixty days after the demurrers to the first amended bill were argued and submitted. (Transcript, pages 42-3-8.) It was, at most, a matter resting wholly in the discretion of the trial court, under these circumstances, to allow or refuse the filing of such amended bill, and the refusal of the court in that behalf will not now be reviewed.

National Bank vs. Carpenter, 101 U. S., 567, 568.

U. S. vs. Atherton, 102 U. S., 372, 375.

Chapman vs. Barney, 129 U. S., 677-681.

Bullitt Co. vs. Washer, 130 U. S., 142, 145.

Central Trust Co. vs. Grant, etc., 135 U. S., 207, 226.

Gormley vs. Bunyan, 138 U. S., 623, 630, 631.

The demurrers to the original bill, as amended, were argued at length by respective counsel, *three* days being devoted to that purpose (Transcript, pages 42-3), and the demurrers were finally submitted to the consideration of the Circuit Court on December 4, 1901 (Transcript, page 43).

Twenty-six days thereafter elapsed before the court ruled upon the demurrers (Transcript, page 43), and during this period no effort was made to either draft an amended bill or apply for leave to file any additional pleading.

During all this time appellant's counsel were fully advised of all the defects in the then amended bill, relied upon by appellee, and appellant deliberately and advisedly took his chances upon the ruling of the court relative to such defects.

Will a litigant be permitted to thus experiment upon the outcome of a judicial decision, and, in the event of an adverse holding, be then allowed an amendment, when, from the beginning of the suit, he had full knowledge of all the alleged

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omitted facts, which the court eventually rules should have been set forth in his original bill? We submit that diligence, *good faith and proper practice* require an answer in the negative.

It has been repeatedly decided that, where an amendment is permissible, the complainant must promptly make application in that behalf at the earliest moment after he becomes aware of the defects in his bill.

Thus, in Professor Fletcher's recent work on Equity Pleading and Practice, section 402, the rule is expressed:

> "A complainant, wishing to amend his bill, must take the first opportunity, after being made acquainted with the defects in it, to ask leave to do so."

But we go farther, and insist that, at the stage of the case when the proposed second amended bill was tendered for filing, the Circuit Court was then without lawful power to receive the pleading or allow it to be filed for any purpose. The equity rules of this court, on the subject of amendment of bills (rules 28, 29, 30 and 35), expressly contemplate that the amendment shall be applied for and allowed, if at all, *before* the rendition or entry of a final decree.

The privilege of applying for or allowing amendments *after* final decree is nowhere recognized by such rules. As early as 1842 the 90th equity rule was promulgated, which, in effect, declares that the practice of the Circuit Court shall be regulated by the practice of the high Court of Chancery in England, where the rules adopted by the Circuit or Supreme Court do not control.

Under the operation of this rule, upon the allowance of a demurrer to a whole bill, the case was out of court, and no proceeding could be subsequently taken therein.

1st Daniels' Chancery Pl. and Pr. (Perkins, 3d Am. Ed.), pages 424 and 624.

Whether this rule would now be enforcible in all its strictness upon the mere sustaining of a demurrer to the entire bill may possibly admit of some question, in view of the remarks of this court in Bank vs. Carpenter, *supra*. But it seems to us clear that if, in addition to sustaining the demurrer, the court renders and enters a final decree, absolutely dismissing the bill, as was done in the present instance, it is too late thereafter to apply for an amendment.

We submit that proper practice requires that when the opinion of the court is announced, sustaining a demurrer to the entire bill, the plaintiff should *then and there, in open court*, before the entering of the decree, make a proper application for leave to amend, and when this is not done a motion in that behalf should not thereafter be entertained, and the evidence of such application should appear from the record entries and not by an *ex parte* affidavit.

The transcript of record in this case discloses (page 43) that on the 30th of December, 1901, the final decree of the Circuit Court was rendered and entered, and the decree then enrolled, unconditionally dismissing the bill of complaint at complainant's cost, without any application having been then made to the court, in any form, by matter of record, for leave to amend the original bill as first amended.

The motion to file the amended bill under consideration was not presented to or filed in court until February 1, 1902, more than 30 days after the enrolling of the final decree. We respectfully submit that the Circuit Court was then without jurisdiction to entertain such motion.

In Fletcher on Equity Pleading and Practice, section 402, it is, *inter alia*, said:

> "Leave to amend a bill, after dismissal thereof, is error."

Citing numerous cases in support of the rule thus announced.

If, perchance, we are in error in the assumption that the application for leave to file the amended bill was interposed too late, then we insist that a proper showing was not made why the proposed amendments were not incorporated in the original bill.

Equity rule 29 provides that, where application to amend the bill is made after the filing of a replication, such amendment shall not be allowed (italics ours)

> "except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of *vexation* or *delay*, or that the matter of the proposed amendment is material, and *could not*, with *reasonable diligence*, have been sooner introduced into the bill."

Certain it is, that the spirit of this rule should be observed where the unusual, if not unprecedented, application is made more than a month succeeding the rendition and entry of final decree dismissing the bill.

An examination of the verified motion of complainant to file such amended bill (Transcript of Record, pages 44-48) will disclose that neither of the indispensable requisites prescribed by the rule last referred to were complied with. Nowhere in such motion or verification is it stated that the

amendment "is not made for the purpose of *vexation* or *delay*," neither are there any facts stated which disclose that, in the exercise of reasonable diligence, the alleged facts set out in the amended bill could not have been incorporated in the original bill. The only attempt made in the latter behalf is a statement upon the part of counsel virtually to the effect that he was ignorant of the law as declared by the Circuit Court in the opinion sustaining the demurrer, viz., that a subsequent creditor could not be heard to raise the question of the alleged *ultra vires* character of the transaction assailed, and that the bill should affirmatively disclose that the creditor for whose benefit the suit was prosecuted was such creditor when the matters complained of occurred, *even were it conceded* that such existing creditor or his representative could successfully maintain the suit.

We deem it unnecessary to argue the proposition that the inattention or inadvertence of counsel, with reference to legal requirements touching the essential elements of a bill in equity, afford no ground for granting the relief in question, where the *facts* sought to be incorporated in the amended bill were known, or, in the exercise of ordinary diligence, should have been known to both client and counsel when the original pleading was framed, and full knowledge of such alleged *facts* when the original bill was drafted, is nowhere denied.

Moreover, in strictness, rule 29 requires that the excusatory facts should themselves be incorporated in an affidavit, separate and distinct from the motion for leave to file the amended bill, and this was not done in the present instance.

In this connection, we may further remark that *if* the alleged error of the Circuit Court, in refusing to allow such second amended bill to be filed, was *properly presented* for the consideration of the Circuit Court of Appeals, the latter court evidently deemed the point to be so devoid of merit

that *it did not deign to notice it in the opinion it handed down,* confirming the decree of the Circuit Court.

We desire to also call attention to the fact that Spencer, the assignee of the People's Savings Bank, and the only creditor whom the receiver (appellant) herein represents, according to the allegations of the original bill, had been engaged in litigating with the appellee National Bank since 1897, and it was the clear duty of such assignee to advise the appellant (receiver) of all facts of which in the exercise of ordinary diligence he could have informed himself during that time, and before the filing of the original bill.

Again, it is evident from the foregoing statements that the second amended bill was not tendered until long after the next succeeding rule day following the entry of the decree of dismissal, and equity rule 30 of this court, in express terms, requires that any amendment allowed shall be filed on or before the next succeeding rule day, and a failure so to do shall be deemed an abandonment of the privilege of amending, even if such privilege had been formally granted. This, alone, is fatal to the application under consideration. For authorities upon this question, see:

Boston, etc., Co. vs. Parr, 98 Fed., 483-4.

Foster's Fed. Pr. (3d Ed.), section 160.

Claflin vs. Bennett, 51 Fed., 693, 702, affirmed in 57 Fed., 257.

We have already called the attention of the court to the fact that plaintiff was allowed to amend his original bill after demurrer filed thereto by defendants, and this amendment was evidently prepared with great care and covers several pages of the transcript of record. (See pages 35-41, Transcript.)

Having been thus once granted the privilege of amendment in compliance with the equity rule, any further application in that behalf, especially after the rendition of final decree dismissing the bill, was a matter resting solely in the discretion of the Circuit Court, and can not be here properly assigned as ground of reversal, even conceding that power existed in the Circuit Court to allow such amendment, the correctness of which concession we dispute.

XVI.

THE PROPOSED AMENDED BILL DID NOT CURE THE VITAL DEFECTS IN THE ORIGINAL PLEADING.

A. In the attempt to avoid the effect of the opinion rendered by the Circuit Court in dismissing appellant's bill, the effort was made to enlarge the averments of the original bill, touching the date when the appellee National Bank first became insolvent, but it will be found, on examination of the allegations in the proposed amendment, that such alleged insolvency is not charged to exist either at the time of making the lease or the payment of moneys for the construction of a bank building. (Abstract, page 64.)

B. Upon the main proposition relied on by appellant, viz., that the outlay of the moneys of the National Bank in the construction of the building upon the demised premises constituted an illegal expenditure of corporate funds, in that such expenditure exceeded the amount of the capitalization of the Bank, the averments of the amended bill in that behalf weakened, rather than strengthened, appellant's case.

The allegations of the amended bill, page 50, subdivision 5 (Transcript of Record), read:

> "That at all times thereafter (July 1, 1889), hereinafter mentioned, down to and including and

> *for some time after* the date of the execution of the alleged pretended contract of lease * * * the said total aggregate amount of the entire share capital remained and continued unchanged, and during all said time was for the said same amount of $300,000, as aforesaid."

Stated concisely, these averments charge that the original capitalization of the Bank remained unchanged, without increase, from the time of the organization of the Bank to the date of the execution of the lease, and "*for some time*" thereafter.

This form of statement is an apt illustration of the familiar vice in a pleading, characterized by the books as a negative pregnant, and which is defined as

> "the statement of a negative proposition in such a form as may imply or carry with it admission of an affirmative."
>
> Anderson's Law Dictionary, title, "Negative Pregnant."

The pleader, by the proposed amended bill, charges, that the original capital of the Bank was not increased before the execution of the lease, or for "some time" thereafter.

The phrase "some time" is of the most vague and indeterminate nature. It is consistent with the idea that the capitalization of the Bank may have been increased on the following day succeeding the execution of the lease, and that proceedings looking to such increase may have been pending and substantially completed at the date the lease became operative.

When the amended bill attempts to charge that the capital of the Bank was not increased prior to a given date, it

is tantamount to a tacit admission, under the rule of pleading adverted to, that the capital of the Bank was, in fact, thereafter duly increased, pursuant to law, and to any amount which the statutes permitted.

Elsewhere in this brief we have pointed out that the law allows the capital of a national bank to be increased to any sum which the comptroller of the currency may approve of, and the provisions of the national banking act, limiting the amount of indebtedness which a banking association may lawfully incur, is predicated upon the capital of the bank as it may exist at the time of the incurring of the indebtedness, and not upon the capitalization originally fixed by its charter.

Accepting, therefore, the tacit admission that the original capitalization of the Bank was at some time, subsequent to the execution of the lease, lawfully increased, without any attempt being made to advise the court touching the extent to which such capital was enlarged, we might safely concede, for the sake of argument, that the validity of the lease was open to question at the time of its execution, upon the theory relied on by appellant, and yet, if during the existence of the demised term, the capital of the Bank was duly increased, pursuant to the statute in that behalf, and after such increase, both the lessee Bank and the lessor treated and recognized the lease as an existing valid instrument of conveyance, and the covenants and obligations thereof operative and binding upon both parties thereto, then, upon the principle of adoption, if not of technical ratification, the original invalidity, if any, of that instrument, would, by legal operation, become cured, and no one could be thereafter heard to assail its binding effect because of the conditions existing when the same was originally entered into.

When the lease was executed, it was then within the potential power of the banking corporation (lessee) to invoke into active life, by proper proceedings thereafter, the right to increase the capitalization of the Bank to any amount necessary to give full validity to that instrument, and where this is the case the subsequent exercise of such potential power renders the contract in question unassailable.

In Angell & Ames on Corp. (10th Ed.), section 304, the text, *inter alia*, reads:

> "A railway company, not authorized to make a particular contract, having, in contemplation of an extension of their powers, authorized an agent to contract for them, may, upon obtaining the requisite powers, ratify, by taking advantage of or acting upon his contract, even though, at the time the contract was made, it was illegal and void."

This court, in Whitney vs. Wyman, 101 U. S., 392-6-7, affirmed the doctrine thus stated, in answering the objection that the corporation (whose contract was there in question) was not authorized to enter into such contract at the time of its execution, as follows:

> "The corporation subsequently ratified the contract, by recognizing and treating it as valid. *This made it in all respects what it would have been if the requisite corporate power had existed when it was entered into.*"

Citing

Angell & Ames on Corp., section 304.

To the same effect see:

White Water, etc., Co. vs. Vallette, 21 How. (U. S.), 414.

Carr vs. La. Natl. Bank, 29 La. Ann., 258-9.

By virtue, therefore, of the tacit admission contained in the plaintiff's amended bill, it is clear that for many years prior to the final cancellation of the lease, such instrument and each of its terms and provisions were in all respects valid, lawful and binding, by reason of the parties thereto having continuously and consistently acted thereon and recognized the same to be in full force and effect; even though it should be conceded, as an extreme proposition, that the instrument when executed was then subject to attack on the theory of an absence of power at that time upon the part of the National Bank to become a party thereto; it inferentially appearing that during the years while the lease was so mutually recognized and acted upon, the defendant Bank possessed full power and lawful authority to enter into a contract of that character.

C. Such amendment does not disclose that the Savings Bank (whom appellant solely represents) became a creditor of the National Bank prior to the making of the lease in controversy. On the contrary such amendment alleges

> "that the said depositors of said Savings Bank and said Savings Bank *became* and were, during all the said times *subsequent to the making of the alleged lease*, and still are, the creditors of said defendant National Bank."
>
> Transcript, page 83, folio 123.

If it should be urged that by the allegations of the proposed amendment, to be found on pages 74-6 (Transcript),

the appellant intended to aver that the indebtedness represented by the judgment recovered by the assignee of the Savings Bank on November 30, 1899, and to collect which judgment was the specific object of this suit, was in existence when the lease was made, then such averments wholly fail to make out a case in that behalf.

The most that can be said of the allegations under consideration is that the Savings Bank was a depositor in the appellee National Bank, prior to and at the time of the making of the lease, and continued to do business thereafter as such depositor, down to the time when suit was brought by the Savings Bank against the National Bank in 1897. But for aught that appears in any statement contained in the proposed amended bill, every dollar of the indebtedness forming the basis of the judgment referred to was contracted long after the execution of the lease, the construction of the bank building and the payment therefor in full.

Merely averring a current course of business between the Savings Bank and the National Bank, commencing in 1889, and extending to 1897, is not tantamount to an allegation that any indebtedness contracted during 1889 or 1890 by the National Bank to the Savings Bank had not been fully paid, long prior to the institution of the suit in 1897.

Moreover, if by any latitude of construction of the allegations of the second amended bill, contained on pages 74-6 (Transcript), it could be said that it was there intended to charge that the indebtedness represented by such judgment was incurred, either in whole or in part, prior to the making of the lease, then such allegations would be absolutely contradictory to the other averments of the amended bill, wherein it is alleged that the indebtedness to the Savings Bank *accrued subsequent* to the making of the lease. (Transcript, page 83, folio 123, and pages 64-5, folios 92-3.)

D. A new and independent theory of recovery is sought to be set up by the second amended bill, in that it is attempted to be there charged that the Savings Bank gave credit to the National Bank, upon the supposition that the National Bank was the owner of the building constructed on the leased ground; that the alleged belief of the Savings Bank in the premises was based upon the alleged assertion of ownership by said National Bank of said building; such allegation of ownership being in the form of public assertions by the National Bank that the said bank building was a part and parcel of the resources and assets of said Bank, coupled with the additional averments that the appellee Schleier carelessly failed and neglected to give any notice to the said Savings Bank, or to the depositors or creditors of the National Bank, of his claims to ownership of said bank building, and that said Schleier failed to give such notice, although he knew that the said National Bank was publicly asserting such character of claim.

In view of the fact that all of the rights and interests of the appellee Schleier, in connection with such bank building, were fully and specifically set forth and contained in a matter of public record, to wit, the spreading at large of the lease in controversy upon the records of the county of Arapahoe, wherein the demised premises and building were situate, and further that it is not claimed or pretended that he in any manner participated in the making or causing to be made such alleged claims of ownership of said building by said Bank, we submit that the question of the effect of such assertions of ownership by the latter, as affording any basis for the invoking of the doctrine of estoppel against appellee Schleier, is fully and finally set at rest by the decision of this court, in Wiser et al. vs. Lawler et al., decided April 27, 1903, reported in 189 U. S., 260, *et seq.*

In that case the owners of certain mining property had entered into a contract of sale thereof, pursuant to the terms of certain escrow agreements between them and the purchaser, the contract of purchase providing that the purchaser should take possession of the property, develop and operate it, and apply the proceeds to the payment of the purchase price; the contract further providing that all improvements made upon the property, or ore taken therefrom, should belong to the vendors in the event of default being made in the payment of any of the installments of the purchase price when the same should mature.

It does not appear from the statement of the case that the escrow agreements or contract of purchase were placed of record, but it did appear from the public records that the legal title to the property was vested in the vendors. After the execution of the contract of purchase, the vendee took possession of the property and caused certain corporations to be organized, and with the view of effecting sales of stock in such companies, the vendees caused printed prospectuses to be published and broadly circulated, the terms of which were calculated and designed to lead prospective purchasers of stock to believe that such corporation was the legal owner of all the mining property in question. Large purchases of the stock were made, based upon such false representation, and the attempt was made to thereafter hold the vendors liable on the theory, that with knowledge of the existence and circulation of such prospectuses, they were estopped to deny the truth thereof.

In utterly repudiating the doctrine of estoppel, under such circumstances, this court, *inter alia*, said:

> "There were no relations between them (vendors) and the purchasers of the capital stock, and

no duty on their part to interfere with the circulation and distribution of the prospectuses and maps, or to inform the subscribers personally that they were the owners of the legal title to the property. They had the right to rely, so far as respected these companies and their stockholders, upon the fact that their title was of record, and was notice of their rights to everyone who contemplated taking stock in the company." * * *

"But conceding defendants to have been apprised of the contents of the prospectus, it would certainly be an exceptional case if a person holding a deed of property which he has placed upon record would be bound to disclose his title to a person contemplating purchasing or making improvements upon the land, or would be estopped from making his claim thereto by mere silence, since he has a right to rely upon the constructive notice given by the record; although the rule would be otherwise in case of positive misrepresentations upon his part." * * *

"But conceding that they (vendors) were fully apprised of their (prospectuses) contents, what action were they bound to have taken. They could not have given notice to the hundreds of thousands to whom the prospectuses were sent, since they were not even apprised of their names and addresses. A notice to the company not to send out these prospectuses would have been equally futile, in case the directors chose to disregard it, since they could not control their action, nor could they have sustained a bill for injunction, since they could have shown no personal injury to themselves by reason of the action of the promoters."

The legal principles so aptly expressed are directly *apropós* to the question in hand. The original fee simple title of appellee Schleier to the demised premises is expressly admitted. The respective rights and interest of the appellee and the Bank to the bank building were also matters of record by the recording of the lease in question. Even if appellee Schleier was advised of the fact (while the public records fully disclosed the respective rights and interests of himself and the Bank in the premises) that the Bank's officers were making public assertions and representations of ownership of such building, he was under no legal or equitable obligation to inquire of the Bank the names and addresses of the hundreds, and possibly thousands, of its depositors and creditors, so that he might be in a position to send out circular letters to such creditors and depositors, that the Bank's alleged assertion of ownership was, in fact, unfounded.

It is not charged or pretended in the amended bill that defendant Schleier knew the extent or character of indebtedness which, from time to time, was being contracted or incurred on the part of the National Bank to the Savings Bank, or that he knew that such Savings Bank was being in any manner prejudiced by such alleged representations, or that it in any manner relied thereon, or was being misled thereby, or that it occupied any relation to the National Bank other or different than was the case with reference to the latter's multitude of other depositors or creditors.

In short, under the decision last referred to, so long as the appellee Schleier took no active part in aiding or abetting the Bank in making such alleged public misrepresentations, his mere silence, even though coupled with contemporaneous knowledge of the making of such representations, would afford no ground or basis for action against him, either at

law or in equity, upon the part of any of the depositors or creditors of the National Bank.

Again, it would be highly inequitable in the present case, from the averments contained in the amended bill, to draw the conclusion that the officers of the National Bank did, in point of fact, perpetrate a wrong or fraud upon any person in connection with such alleged representations. The Bank officers knew that the lease in controversy was a matter of public record. Under the terms of such lease the Bank and its assignees would remain, for a period of ninety-nine years, in a qualified sense, the owners of said bank building, *so long as all the covenants of the lease on their part to be performed, were fully met.*

Hence, in a loose, general sense, the Bank might be said to be the owner of the building, so long as the lease remained operative and in force, and it was doubtless in this sense, and in this only, if at all, that the pretended representations of the Bank were ever made. However this may be, the fault or wrong, if any, of the Bank, in the premises, is in nowise chargeable to appellee Schleier, who is virtually the sole defendant in this suit.

As we have already observed, the theory of estoppel was advanced by the appellant for the first time in the amended bill under consideration, more than a month after the original bill had been dismissed for want of equity. It is, therefore, a plain attempt to shift the ground upon which the suit was originally begun, and to advance a new and independent theory from that originally taken in the bill before the court at the time of its dismissal.

The theory of estoppel first advanced by the amended bill necessarily presupposes an admission that defendant Schleier possessed lawful ultimate title to the bank building, but that in equity he ought not to be allowed to assert and

establish such valid title, because of alleged matters in the nature of estoppel *in pais.*

On the other hand, the theory of the original bill was that the appellee never possessed any character of lawful title, either legal or equitable, to the bank building, or, at least, that he was accountable, in equity, for the full value or cost thereof to the creditors of the Bank, because the contract under which said building was erected was *ultra vires.*

But the most conclusive answer to the theory of the amended bill is the fact that the relief prayed for therein utterly ignores the idea of an estoppel as affording any ground upon which appellee Schleier should be held accountable.

The prayer in the amended bill is substantially identical with that in the original bill, and asks the court for a decree, annulling both the original lease and the surrender thereof, solely upon the ground that the transactions represented thereby respectively were *ultra vires*, and no relief whatever is asked upon the ground that the appellee should be adjudged estopped in any manner by virtue of any matter or thing arising subsequent to the execution of such lease.

Much more might be appropriately said and urged in support of the proposition that the amended bill in nowise aided the theory upon which relief was sought, or had the effect to cure the vital defects in the original bill, but we believe enough has been said in that behalf.

Should the question be here raised, or the thought arise in the mind of the court, whether under the statutes of Colorado a written lease of realty for a term of years is an instrument authorized thereby to be made a matter of public record, we will set the subject at rest by reference to provisions of such statutes in that behalf.

Section 446, chapter 29, Mills' Ann. Stat. of Colo., relating to conveyances and the recording thereof, *inter alia*, reads:

> "All deeds, conveyances, agreements in writing of or affecting title to real estate, or *any interest therein*, and powers of attorney for the conveyance of any real estate, or any interest therein, may be recorded in the office of the recorder of the county wherein such real estate is situate, and from and after the filing thereof for record in such offices * * * such deeds * * * * * and agreements in writing shall take effect as to subsequent *bona fide* purchasers and encumbrances by mortgage, judgment, or otherwise, not having notice thereof."

Section 456 of the same chapter reads:

> "The terms 'land' and 'real estate,' as used in this chapter, shall be construed as coextensive in meaning with the terms 'lands, tenements and hereditaments,' and as embracing all mining claims and other claims and *chattels real*. The term 'deed' includes mortgages, *leases*, releases, and every conveyance or encumbrance under seal."

And section 833, 1 Mills' Ann. (Colo.) Stats., *inter alia*, reads:

> "He (county clerk and recorder) *shall* also record or cause to be recorded in print, or in plain and distinct handwriting, in suitable books to be provided and kept in his office, all deeds, mortgages, maps, instruments and writings authorized by law to be recorded in his office."

And the Supreme Court of Colorado, in McKee vs. Howe, 17 Colo., 538-541, in speaking of the effect of these various statutory enactments, remarked:

> "In this state, by sundry statutes, interests in land, such as chattels real, *leases* for a term of years, and the like, are regarded as real estate, instead of personalty."

Reference is then made to another section of the Colorado statutes there cited, which reads:

> "The word 'land' or 'lands,' and the words 'real estate,' shall be construed to include lands, tenements and hereditaments, and all rights thereto, and *all interests therein*."
>
> General Stats., section 4132; 2 Mills' Ann. Stats., section 4185."

The court then adds:

> "A lease of land for a term of years is certainly an interest in lands."

The court there applied these various statutory provisions by holding that where an intestate died, possessed of an unexpired leasehold interest in lands for a term of years, such unexpired term descended to and vested in the heirs of the deceased, and not in his administrator.

It is, of course, familiar law, that the character of title or interest acquired by the National Bank to the demised premises, under the lease in controversy, is to be measured and controlled by the laws of the state where such land is situate; and, under such laws as we have pointed out, a written lease for a term of years is regarded as a conveyance

of an estate or interest in realty, and is admissible to public record with the same force and effect, as constructive notice of its contents, as would be the case of a deed conveying the fee simple title.

It was urged in the Court of Appeals, and the point may be again pressed here, that *simple* creditors are not affected by the recording statute of Colorado, notwithstanding the act, in express terms, declares that creditors, *by* "*judgment* or *otherwise*," are bound thereby.

Section 446, Mills' Colo. Stats., *supra*.

Two Colorado cases are cited in support of this somewhat remarkable contention. The first is the early case of Gillett et al. vs. Gaffney et al., 3 Colo., 351-366. No question in anywise similar to the one under consideration was there involved. The facts of the case disclose that all that the court was called upon or intended to decide was, that the recording of a deed, executed by one co-tenant, designed to have the effect of a repudiation of the co-tenancy, would not, *per se*, start the statute of limitations running in favor of the grantee in such deed, as against the co-tenant who is sought to be ousted. That a judicial holding, under such a state of facts, can not be availed of in the case at bar, is too clear to admit of argument.

The other Colorado case was not decided by the court of last resort, but by an intermediate appellate court, to wit, the Court of Appeals.

The case relied on is Rose vs. Dunklee, 12 Colo. App., 403-14-15. All that was decided in that case was, that where a judgment debtor had executed and caused to be recorded a deed, the expressed consideration of which was $1, such statement of consideration would not, *per se*, suffice to start the statute of limitations running as against the judgment creditor who subsequently attacked the deed on the

ground that the same was a voluntary conveyance, made with the intent to delay, hinder and defraud creditors.

That this is all the court intended to hold is evident from the language appearing on page 415, *supra*, where it is said (italics ours):

> "To charge him (judgment creditor) with notice of the voluntary character of the conveyance, when he was unadvised as to the financial condition of the grantor, is stretching the doctrine of constructive notice to the point at which it ought to and must break. The consideration put into deeds can not, in this country, be taken as an evidence of the actual price paid. * * * If we should hold that a creditor who is without right to file a bill, because he is a general creditor and not one by judgment, is bound to take notice of recorded deeds, and of *the expressed consideration, and therefore conclude that the conveyance is voluntary*, it would be carrying the doctrine of constructive notice to an extent unwarranted by precedent," etc.

It will be observed, from these excerpts, that neither the Supreme Court of Colorado, nor the Court of Appeals of that state, was called upon to decide, or intended to intimate, that a *simple* creditor was not chargeable with constructive notice of the character of title appearing of record, which his debtor was clothed with to realty, in his possession at the time of the incurring of the indebtedness.

Indeed, to hold that a simple creditor is not chargeable with such notice would be, in effect, to declare that the recording statutes are worse than useless—"a delusion and a snare." It would mean that where a mortgagor, in possession of realty, has duly executed, acknowledged and deliv-

ered a mortgage thereof, and the mortgagee duly causes such mortgage to be placed of record, persons thereafter extending credit to the mortgagor in possession are not chargeable with constructive notice of the recorded mortgage.

Such, we submit, is not the law, in any state of the Union, and is directly contrary to the express holding of this court, in Wiser vs. Lawler, *supra*.

The motion to file the amended bill was properly refused upon another ground. The final decree had been rendered and entered over a month before the tender of such amended bill, and in the motion for leave to file such bill no application was made to vacate the final decree. (Transcript, pages 44-48.)

The trial court could not properly permit the filing of an amended bill in a suit that had been previously dismissed by a final decree, while such final decree stood unvacated and in force. A motion to vacate the decree, therefore, should have preceded or accompanied the application to amend, and such motion not having been made, the court was without power to permit the filing of the amendment.

Many other reasons might be suggested why the action of the trial court was entirely proper in declining to allow the amended bill to be filed, but the foregoing we deem to be sufficient.

We, therefore, respectfully submit the cause to the judgment of this court, confidently believing that a judgment of affirmance is not only justified, but required.

Respectfully submitted,

John F. Shafroth

G. C. BARTELS,
J. H. BLOOD,
Of Counsel.

JNO. M. WALDRON,
R. D. THOMPSON,
Solicitors for Appellees.

Supreme Court of the United States.

No. 188.—October Term, 1903.

Edwin F. Brown, as Receiver of the People's National Bank of Denver, Colorado, Appellant,
vs.
George C. Schleier and the People's National Bank of Denver, Colorado.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

[April 4, 1904.]

This suit was brought by the predecessor of appellant in the Circuit Court of the United States for the District of Colorado to set aside a lease of certain lots in the city of Denver, Colorado, and the subsequent surrender and cancellation of said lease, as *ultra vires* of the power of the National Bank of Denver, and for an accounting, and that the amount found due on the accounting be decreed a prior lien upon the lots and the building erected thereon by the bank. The case was presented upon bill and demurrers. The demurrers were sustained and the bill dismissed. (112 Fed. Rep. 577.) The ruling was affirmed by the Circuit Court of Appeals. (118 Fed. Rep. 981.)

The People's National Bank of Denver was incorporated on the 1st of August, 1889, as a national bank under the National Banking act. Its capital stock was $300,000, and its corporate existence to be twenty years. In September, 1889, the appellee Schleier was the owner of lots 1, 2, 3 and 4 in block 75 in the city of Denver, and on that day made a lease thereof to the bank for the period of ninety-nine years from the first day of November, 1890, with an option to extend the term for a further period of fifty years, at an annual rental of $13,975, payable monthly. The bank covenanted to remove at its expense buildings located on the lots within a designated period and to erect thereon a building four stories in height, at a cost of not less than $100,000, which should at once become part of the realty. The bank also covenanted to keep the building and premises in repair and pay all taxes thereon. And it was covenanted that in case of default in the payment of rent, taxes, or performance of other conditions, for the period of fifteen days, Schleier should have the right, after thirty days' notice, to sell and dispose of the lease and all the right and title of the bank thereunder, or to maintain personal actions for the rent or taxes he might have to pay. The heirs, representatives and assigns or successors of the parties were entitled to the benefits of the lease and were to bound by its covenants.

The bank erected a building on the lots at an expense of $305,735.30, completing the same January, 1891. The building contained necessary offices for the use of the bank, which were occupied by it until it ceased to do business. The building also contained other offices and rooms which the bank rented to parties not connected with it, and to the People's Saving Bank, a corporation organized under the laws of Colorado.

On the 19th of July, 1893, the bank being unable to pay its depositors, it was placed in the hands of the Comptroller of the Currency, and one J. B. Lazier was appointed receiver thereof, who remained in charge of its affairs until August 21, 1893. On that day the bank agreed to make a voluntary assessment to restore the impairment of its capital, and the receiver was discharged. The directors and officers of the bank then took charge of its business and conducted it until the appointment of the receiver herein.

The bill alleges that the affairs of the bank were very "much involved, mixed and commingled" with those of the People's Savings Bank, and by reason thereof the latter was unable to proceed with its business, and made a general assignment of its assets to Fermor J. Spencer, who has ever since remained in charge and control thereof. As such assignee he sued the People's National Bank and recovered a judgment for the sum of $475,825.71, which has not been paid.

In January, 1897, the bank commenced to take steps looking to a voluntary liquidation and surrender of its charter, and on or about the 27th of April, 1897, the stockholders published a notice of the bank's intention to go into liquidation, and fixed the 27th of June as the last day on which claims could be presented. Prior to that day Spencer, having commenced suit against the bank for an accounting and adjustment of the matters between the banks, served a summons therein, and also having given notice to the Comptroller of the Currency of the United States of the claims and demands of the savings bank, an agreement was entered into between Spencer and the People's National Bank, whereby he agreed to refrain from taking any further steps in said suit until January 1, 1898, without prejudice by reason of the delay. The bank on its part agreed in consideration of the delay that it would "take no further action or kind or nature whatsoever to the prejudice of the savings bank," or any action for the surrender of its charter or the disposal of its property, "to the prejudice of the savings bank."

On the 20th of September, 1897, the People's National Bank called and gave notice of a special meeting of its stockholders, for the purpose of considering the proposition to turn over its building to Schleier, the owner of the land, and at the meeting held October 27, 1897, in pursuance of the notice, it was resolved so to do in consideration of a release by Schleier, to

the bank and its stockholders from all liability which might thereafter accrue under the terms of the lease. The lease was thereupon cancelled and the premises surrendered to Schleier. This is alleged by appellant to have been in violation of the statutes of the United States and contrary to the principles of equity governing the distribution and disposition of assets in the payment of dividends on dissolution of insolvent corporations.

It is also alleged, on information and belief, that the notice of the stockholders' meeting stated that the income of the property was less than the fixed charges, and that it was so stated at the stockholders' meeting by the officers of the bank and by Schleier's attorneys and agents, but such was not the case. On the contrary, it is alleged on information and belief, that the income of the property, even in the condition which the neglect of the bank had brought it, was sufficient to pay the rents and all charges due under the lease and keep the building in good order and repair.

The grounds of the demurrers were want of equity and laches. The demurrers were sustained and the bill ordered to be dismissed.

The judgment of dismissal was entered December 30, 1901. On the 1st of February, 1902 appellant tendered an amended bill of complaint and moved for leave to file the same. The motion was denied. This action is assigned as error as well as the ruling on the demurrers.

Mr. Justice McKenna, after stating the case, delivered the opinion of the Court.

The bill prayed for a decree declaring the lease between the bank and Schleier and the instruments surrendering and cancelling the same to be declared void and "*ultra vires* of the acts of Congress of the United States in respect to the powers of national banks to acquire, own and hold real estate or to be or become indebted in the exercise of corporate powers, and that no title or right, legal or equitable, could be acquired under the same or either thereof by the said defendant Schleier to the said bank building and the appurtenances thereunto belonging." An accounting was also prayed, and that the amount found due declared a lien upon the building and lots, and they be sold to satisfy the lien. The Circuit Court of Appeals regarded the bill as charging, not only the initial, but the dominant and determining wrong to be the lease, that being Schleier's participation in the alleged diversion of the bank's funds, constituting him a trustee for creditors. It was, therefore, natural for the court to observe the theory of the bill was that the lease was void, and that Schleier was liable for the damages which the creditors of the bank sustained in consequence of its execution without lawful authority. The court discussed that theory, and decided (1) that the power conferred by section 5137 of the Revised Statutes upon national

banks to purchase real estate needed for their accommodation in the transaction of their business included the power of leasing property whereon to erect buildings suitable for their wants; (2) assuming the transaction to have been *ultra vires*, the complainant (appellant) was not by virtue of his office as receiver "authorized to challenge or impeach it."

Appellant now says that the conception of the bill by the Circuit Court of Appeals was incorrect, and "not only limits, but completely reverses the theory of the bill, in a manner totally inconsistent with the admitted allegations." And appellant concedes "that only the government may complain of an executed *ultra vires* conveyance of real estate to a corporation," and rests his case upon "loss of the moneys and assets of the bank—in the form of the bank building—to which Schleier claims title through the conveyance and surrender on October 30, 1897, under the terms of his lease to the bank."

We may take appellant at his word and omit extended discussion of the first proposition, although he has indulged in much argument which confuses his concessions. For instance his counsel say: "While denying the sufficiency of the lease to lawfully bind either the bank or its title to its $305,000 capital assets, we say, very well then! Since in the completed building in the actual possession of the bank, it still had an asset, the then depositors, now judgment creditors of this bank, represented by this appellant receiver, want to know why Schleier, who is not an innocent purchaser for value, without notice, should not be held liable to account for this asset, the building?"

But pronouncing Schleier not an innocent purchaser, denominating the building an asset of the bank, does not change the issues in the case. It is only another way of presenting them. Why should Schleier account for the building? Necessarily either because of the execution of the lease or its surrender. Of its execution we need not make much comment. The lease certainly was not different from any other interest in real estate acquired *ultra vires*—no more vulnerable to attack, no more a diversion of funds. Whether it would be a gain or loss—an antithesis made much of in argument to distinguish between the lease and an absolute conveyance—was a matter of judgment. It seems now to have been a folly for the bank to have put its whole capital in a building. But, may be, that is the confident conclusion which can be formed after experience. The judgment of the bank in making the lease and erecting the building seems not to have been thought by creditors to have been improvident, and the Comptroller of the Currency did not disapprove. The bill alleges that the Comptroller of the Currency, in the year 1893, deemed an assessment of twenty per cent sufficient to redeem the bank from embarrassment and establish it as a solvent concern; and its chief creditor, the People's Savings Bank, whose affairs, the bill avers, had

become "commingled and mixed" with those of the bank and thereby associated with its fortunes, must have had absolute confidence in the value of the building, even though it represented diverted funds. If depreciation came afterwards, it was a misfortune. Under the concession of appellant, therefore, the validity of the lease must be assumed as against him, and the inquiry confined to the validity of the surrender; and that depends upon the condition of the bank at the time it was done. In other words, the lease, with its benefits or burdens, and the condition of the bank at the time of its surrender, must be the test of the action of the bank officers and the rights of creditors.

The bank was insolvent, taxes on the property were unpaid and three months' rent were due. Under the terms of the lease, Schleier could pay the taxes, and for reimbursement and the satisfaction of the rent could sell the lease and all the right, title and interest of the bank therein, or maintain personal actions for such taxes and rent. Schleier, therefore, for what was then due and for his monthly accruing rent, had not only a lien upon the property, but had as well the personal obligation of the bank. Against this liability what had the bank? The bill alleges nothing but the lease, and to that no value is assigned. Its revenue did not exceed its obligations. It is true it is alleged that the building had been allowed to get out of order, and that notwithstanding its condition the rents from it would have paid the charges against it. But the fact establishes nothing definite. What can be inferred from it? Such disproportion between the value received by Schleier and that received by the bank as to shock the conscience, establish fraud, and that the surrender of the lease was an illegal preference? The situation must be kept in mind. The bank was and had been insolvent. It was compelled to go into liquidation; it was in arrears for rent and taxes, and was confronted with ever-recurring liabilities which it might not be able to discharge. Certainly could not discharge unless it remained a going concern, which was not possible. Under such circumstances the settlement with Schleier does not seem to have been even bad judgment. And it was openly done—advertised in advance to all who were interested to prevent, and the reason for it declared to be that the income of the property was less than the fixed charges; in other words, had no value—represented only liabilities. No one intervened. Creditors did not, and this suit was not brought until December, 1900—three years after the surrender of the lease. The conclusion is irresistible that the judgment of the stockholders in surrendering the lease was honestly and prudently exercised. This is fortified by the prayer of the bill. Appellant does not ask to have the surrender of the lease set aside and the bank restored to its relations and obligations to Schleier. He asks that the bank be relieved from all obligations and the cost of the building imposed as a charge upon the real estate.

It is unnecessary to discuss the ruling of the Circuit Court on the motion to file an amended bill. The bill tendered was fuller and more explicit than either the original bill or the amendments thereto, but it alleged nothing which would affect the legal conclusions from the facts to which we have adverted. And we may observe that it is exceedingly disputable whether it is an abuse of discretion to deny a motion to file an amended bill after final judgment has been entered.

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.